Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

WILLIAM N. WEBER, M.D.,
Petitioner

v.

DEPARTMENT OF VETERANS AFFAIRS AND ANTHONY J. PRINCIPI, SECRETARY OF VETERANS AFFAIRS,
Respondents

On Petition for Writ Of Certiorari
To The United States Court of
Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

Petitioner, Dr. William N. Weber, was discharged from his position as a physician with the Department of Veterans Affairs on September 13, 1999, based on a recommendation of a summary review board. Dr. Weber filed an action for judicial review of his discharge in district court.

On June 3, 2004, the district court vacated the decision of the summary review board and remanded for further action. The district court ruled "the VA's termination to be "arbitrary, capricious, and not in accordance with law." (Appendix 4) The VA did not appeal this decision.

The VA reinstated Dr. Weber effective June 3, 2004. Dr. Weber was without pay from the time of his discharge September 13, 1999 to the reinstatement on June 3, 2004.

Dr. Weber filed a new lawsuit seeking his back pay under the Back Pay Act. The district court dismissed his action under the Back Pay Act and the Administrative Procedures Act and the 9 th Circuit Court of Appeals affirmed. It is from the 9 th Circuit decision that Dr. Weber petitions for certiorari.

1. Whether the district court has jurisdiction to hear a claim under the Back Pay Act, 5 U.S.C. § 5596, from a discharged Tile 38 appointed employee of the Veterans Administration.

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Weber v. Department of Veterans Affairs,
512 F.3d 1178, 13 Wage & Hour Cas.2d (BNA) 371, 08 Cal. Daily Op. Serv. 493, 2008 Daily Journal D.A.R. 607, C.A.9 (Mont.), January 15, 2008 (NO. 06-35522)

Weber v. Department of Veterans Affairs and Anthony J. Principi, CV 04-46-H-SEH, United States District Court, District of Montana, Order of Dismissal, Docket No. 34.

Statement of Jurisdiction

The Amended Judgment of the Ninth Circuit was entered on April 4, 2008. The United States Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1)

Constitutional Provisions; Statutes and Regulations

5 U.S.C. § 701-706
5 U.S.C. § 5596
38 U.S.C. § 7401
38 U.S.C. § 7403(b)(1)
38 U.S.C. § 7405(a)(1)(A)
38 U.S.C.§ 7461 (c) (3)
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VA Handbook 5005, Part II, Chapter 3, Subsection F(3)(d)
VH Handbook 5021, Part III, Chapter 1(1), (3)
VA Handbook 5021, Part V, Chapter 1, paragraph 8
VA Handbook 5021, Appendix A(5)

Statement of the Case

The facts have been set out above in the questions presented for review. The district court had jurisdiction over this matter, pursuant to the Back Pay Act, 5 U.S.C. § 5596. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 USC § 1331. A federal district court has jurisdiction over a judicial review and back pay case under the federal question statute, 28 USC § 1331. *Ward v. Brown*, 22 F.3d 516, 519 (2nd Cir. 1994).

Argument

The Ninth Circuit in denying jurisdiction under the Back Pay Act has created a direct conflict between circuits regarding jurisdiction for determination of claims under The Back Pay Act, 5 U.S.C. § 5596. *See*, *Weber v. Department of Veterans Affairs,* 521 F.3d 1061, 1067 (9th Cir. 2008, Appendix 1) *and Ward v. Brown*, 22 F.3d 516, 520 (2d Cir. 1994, Appendix 5) and *Romero v. United States*, 38 F.3d 1204, 1211 (Fed.Cir.1994).

The Ninth Circuit holds that a Physician appointed under Title 38 of the United States Code cannot seek damages or review of summary review board decisions under the Back Pay Act. The Ninth Circuit also holds that the district court is not an "appropriate authority" to determine whether a VA employee was subjected to an unjustified personnel action. *Weber, supra.*

The Second Circuit holds that the Back Pay Act provides an "explicit waiver of sovereign immunity" for a nurse appointed under Title 38 of the United States Code. *Ward, supra at* 520.

The Federal Circuit holds that a district court is an "appropriate authority" under the Back Pay Act to review an agency determination regarding matters not covered by the Civil Service Relief Act. *Romero, supra*, at 1211.

Dr. Weber was appointed under Title 38 and

was discharged based on a recommendation of a summary review board. After receiving a favorable decision from the district court holding that the discharge was not in accord with law Dr. Weber filed a Back Pay Act claim. *Weber*, 521 F3d at 1064-1065. The Ninth Circuit held that the district court did not have jurisdiction under the Back Pay Act.

Mr. Ward was a nurse with the VA, appointed under Title 38, who was discharged after a review board recommend his discharge. He sued under the Back Pay Act for damages. The Second Circuit held that the Back Pay Act affords the district court jurisdiction over the claim. *Ward, supra.*

"The Back Pay Act is the means by which appointed employees subject to unjustified personnel action are given a cause of action against the United States." *Ward, at* 520. The Back Pay Act provides an explicit waiver of sovereign immunity. *Id.* The Act provides a federal government employee is entitled to back pay if "found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay ... of the employee." 5 U.S.C. § 5596(b)(1) and *Ward, at* 520.

Dr. Weber's claim for back pay falls within the terms of the Back Pay Act. The district court found that a federal government agency, the VA, subjected Dr. Weber to an unwarranted personnel action that

resulted in the withdrawal of pay. According to the Federal Circuit, but not the Ninth Circuit, the district court is an "appropriate authority" to make Back Pay Act rulings. *Romero v. United States*, 38 F.3d 1204, 1211 (Fed.Cir.1994), (holding that a district court is an "appropriate authority" under the Back Pay Act to review an agency determination regarding matters not covered by the Civil Service Relief Act.); *Weber, at*, 1067.

The Back Pay Act provides Dr. Weber the necessary waver of sovereign immunity to have his case heard in federal district court, and as such, the district court had jurisdiction to hear this case. The split between the circuits should be resolved.

The purpose of Back Pay Act is to put an employee who was the victim of an unjustified or unwarranted personnel action in the same position as he would have been had the erroneous action not occurred. *Wells v. F.A.A.* 755 F.2d 804 (11th Cir.1985) The Act provides:

> An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has

> resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee–
>
> (i) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--
>
> (ii) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and
>
> (iii) reasonable attorney fees related to the personnel action.

5 U.S.C. § 5596(b)(1). Dr. Weber seeks all compensation permitted under the Back Pay Act.

The VA's failure to follow its own rules is an "unwarranted personnel action" and Dr. Weber is entitled to back pay. The district court ruled that the VA violated its own rules when it discharged Dr. Weber in September, 1999, and ruled the agency action arbitrary, capricious, and not in accordance with law. (See order and judgment in CV 00-10-H-SEH). An "unwarranted personnel action" under the Back Pay Act, 5, U.S.C. § 5596 may result from errors of procedure, not simply those of substance. *Alaniz v. Office of Personnel Management*,

728 F.2d 1460, 1470 (Fed.Cir.1984).

In general, where adverse actions are taken by agencies without providing adverse action procedures, the action constitutes an "unjustified or unwarranted personnel action" within the meaning of the Back Pay Act, and entitles the employee to back pay. *Summers v. United States*, 227 Ct. Cl 353, 648 F2d 1324, 1327 (Ct. Cl. 1981); *Bur v. United States*, 621 F.2d 415, 416 (1980); *Shaposka v. United States*, 215 Ct.Cl. 34, 43, 563 F.2d 1013, 1018 (1977); *Gratehouse v. United States*, 206 Ct.Cl. 288, 296, 512 F.2d 1104, 1108 (1975), cert. denied, 434 U.S. 955, 98 S.Ct. 480, 54 L.Ed.2d 313 (1977). This is so because of the harmful procedural error and follows whether or not the grounds for the adverse action would be sustained on the merits. *Summers, supra*, at 1327; *Shaposka v. United States*, supra, 215 Ct.Cl. at 43, 563 F.2d at 1018; *Gratehouse v. United States, supra*, 206 Ct.Cl. at 296 n.3, 512 F.2d at 1108 n.3.

Where there has been a serious procedural defect in the prescribed events leading to the discharge of a Government employee, the employee may be entitled to the continued benefits of his employment until he has been terminated in proper fashion. *Ryder v. United States*, 585 F.2d 482, 487-88 (Ct.Cl.1978); *Shaposka v. United States*, 563 F.2d 1013, 1018 (Ct.Cl.1977). Dr. Weber is entitled to a decision granting him back pay based on the district court's judicial review decision that the VA did not discharge him pursuant to their own rules.

When the district court vacated the summary review board decision, Dr. Weber was reinstated in the same capacity he held as of September 13, 1999. Upon cancellation of unwarranted personnel action an agency is required to restore employee as nearly as possible to status quo ante; thus, employee is entitled to receive whatever rights and/or benefits he would have had if agency's action had not occurred. *Harrison v. Veterans Admin.*, M.S.P.B.1990, 44 M.S.P.R. 594. Merit Systems Protection 524; 5 U.S.C. § 5596, see also, *Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed.Cir.1984).

United States v. Fausto, 484 U.S. 439, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988), does not preclude Dr. Weber's Back Pay Act claim for the unwarranted personnel actions of the VA. Cases cited by Dr. Weber holding that an agencies failure to follow its own rules subjects an agency to back pay act claims due to unwarranted personnel actions, are not abrogated by Fausto. The holding in Fausto did not state that a failure to follow agency rules was not an unwarranted personnel action. Rather, Fausto held that those employees governed by the Civil Service Reform Act were limited in their avenues of appeal to the Court of Claims for the underlying personnel decision. *Fausto, supra*, at 4 U.S. 454.

Despite the ruling of the Ninth Circuit, nothing in Fausto bars Dr. Weber's request for relief in this case. Dr. Weber is not seeking relief from the Court of Claims and the Civil Service Reform Act does not apply to Dr. Weber. In addition, the Civil Service

Reform Act in question in Fausto has been amended to permit review for nonpreference eligible members of the excepted service. See, *Bosco v. US*, 931 F2d 879, 883, fn 3 (Fed Cir. 1991), aff'd, 976 F.2d 710, 714 (Fed.Cir.1992).

The court in Bosco, in holding that the Court of Claims did have jurisdiction to review an employment decision and award back pay pursuant to the Back Pay Act stated:

"The Supreme Court did not rule that the CSRA provided the only means of judicial review of any actions affecting federal employees, but rather that it was the only means of review as to the types of adverse personnel action specifically covered by the CSRA."

Id. See Romero v. United States, 38 F.3d 1204, 1211 (Fed.Cir.1994), holding that a district court is an "appropriate authority" under the Back Pay Act to review an agency determination regarding matters not covered by the Civil Service Relief Act.

Just as in Bosco and Romero, Dr. Weber is not covered at all by the Civil Service Relief Act. Fausto does not bar Dr. Weber's Back Pay Act Claim and the district court is an "appropriate authority" under the Back Pay Act. The United States Supreme Court should address the dichotomy between *Weber*, *Ward* and *Romero* and clarify this area of law.

DATED this 3rd day of July, 2008.

SMITH LAW FIRM, P.C.

By: s/ Bruce M. Spencer
Bruce M. Spencer
Attorney at Law

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APPENDIX 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM N. WEBER, M.D., *Plaintiff-Appellant,* v. DEPARTMENT OF VETERANS AFFAIRS AND ANTHONY J. PRINCIPI, SECRETARY OF VETERANS AFFAIRS, *Defendants-Appellees.*	No. 06-35522 D.C. No. CV 04-046-H-SEH ORDER AMENDING OPINION AND AMENDED OPINION

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Argued and Submitted
October 19, 2007- Seattle, Washington

Filed January 15, 2008
Amended April 4, 2008

Before: Ronald M. Gould and Richard A. Paez,
Circuit Judges, and Lyle E. Strom,* District Judge.

Opinion by Judge Strom

*The Honorable Lyle E. Strom, Senior United States District Judge for the District of Nebraska, sitting by designation.

SUMMARY

Civil Litigation and Procedure/Jurisdiction

The court of appeals vacated a judgment of the district court and remanded. The court held that Title 38 of the United States Code, governing the appointment and employment terms of Veterans Administration (VA) physicians, does not provide for judicial review of the decisions of summary review boards for probationary employees.

Appellant William Weber filed suit in district court in Montana against appellee the Department of Veterans Affairs, seeking back pay under the Back Pay Act and the Administrative Procedure Act (APA) for a time period between his 1999 separation from his staff radiologist position at a VA center and his 2004 reinstatement. Weber was appointed to his position subject to a two-year probationary period and to summary board review; the board recommended Weber's separation from his position within the two-year period. Weber claimed that he was entitled to back pay based on the district court's prior decision vacating the review board's separation recommendation for failure to comply with notice requirements. In the present case, the district court granted summary judgment in favor of the VA, finding that its prior decision afforded no basis for a BPA claim.

Weber appealed.

[1] In order for a plaintiff to bring a viable suit against the federal government or its agencies, the government must have waived its sovereign immunity. Consequently, a person attempting to sue a federal agency or officer must demonstrate that the claim being asserted is covered by a specific statutory authorization to sue the United States. [2] Under the APA, federal sovereign immunity is waived for suits against the federal government in which the plaintiff is seeking relief

other than money damages. [3] In a case in which a federal administrative officer brought a federal action challenging his removal and seeking back pay under the Civil Service Reform Act (CSRA), the Supreme Court determined that the comprehensive statutory scheme set forth in the CSRA did not provide for judicial review for the actions taken against members of the excepted service, such as the administrative officer. [4] Title 38 of the United States Code governs the appointment and employment terms of VA physicians. Weber was appointed as a VA radiologist under 38 U.S.C. § 7401(1); therefore, his employment was governed by the Veterans Health Administration personnel system. Like the CSRA, Title 38 provides a comprehensive regulatory scheme for employees of the VA. This statutory scheme does not provide for judicial review of the decisions of summary review boards for probationary employees. Therefore, the APA did not provide a basis for Weber to assert his BPA claim.

[5] The BPA provides a waiver of sovereign immunity, which can be invoked by: (1) a finding of an unjustified or unwarranted personnel action; (2) by an appropriate authority. [6] Title 38 prevents probationary physicians such as Weber from seeking judicial review of summary review board determinations under the BPA. Because the board's determination was but an interim step in a multi-level

decision process, Weber's only recourse was within his agency, not with the district court. [7] It had to be concluded that the district court lacked jurisdiction to adjudicate Weber's claim for back pay. Weber's case had to be remanded to the district court with instructions to dismiss Weber's complaint for lack of jurisdiction.

COUNSEL

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William W. Mercer, Assistant United States Attorney, Great Falls, Montana, for defendants-appellees Department of Veterans Affairs and Anthony J. Principi, Secretary of Veterans Affairs.

ORDER

The opinion filed on January 15, 2008, is hereby amended as follows:

At slip op., p. 529, 512 F.3d 1178, 1183-84, delete the following:

> Because Dr. Weber failed to raise this claim before the district court, and no exceptional circumstances justify this failure, we decline to address this claim. *See Monetary II Ltd. P'ship v. Comm'r*, 47 F.3d 342, 347 (9th Cir. 1995) (internal quotation marks omitted) (stating "[a]s a general rule, an appellate court will not consider arguments which were not first raised before the district court, absent a showing of exceptional circumstances").

Replace with the following sentence:

> Because Dr. Weber did not properly raise this claim before the district court, and no

exceptional circumstances justify this failure, we decline to address this claim. *See Rains v. Flinn (In re Rains)*, 428 F.3d 893, 902 (9th Cir. 2005) (finding the plaintiff's due process claim waived on appeal because he first raised the claim before the district court in his reply brief); *see also Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001, 1007 (9th Cir. 2008) (stating that "it is well-established that an appellate court will not consider issues that were not properly raised before

the district court") (alterations and internal quotation marks omitted).

With this amendment, appellant's petition for rehearing is DENIED. Further petitions for rehearing and petitions for rehearing en banc may not be filed.

OPINION

STROM, District Judge:

Appellant Dr. William Weber ("Dr. Weber") appeals from the February 23, 2006, order of the United States District Court for the District of Montana denying his motion for summary judgment on his claim for back pay under the Back Pay Act, 5 U.S.C. § 5596, and granting appellees' motion to dismiss Dr. Weber's claim.

I. BACKGROUND

On October 1, 1997, Dr. Weber was appointed to the position of staff radiologist at the Veterans Administration Medical and Regional Center ("VAMC") in Fort Harrison, Montana, pursuant to 38 U.S.C. § 7401(1). Dr. Weber's appointment was initially temporary, but the VAMC converted the position to a full-time staff position on December 7, 1997. As mandated by 38 U.S.C. §§ 7403(b)(1) and (2), Dr. Weber's appointment was subject to a two-year

probationary period and to board review. Section 7403(b)(2) states, in pertinent part:

> The record of each person serving under such an appointment in the [m]edical . . . [s]ervices shall be reviewed from time to time by a board, appointed in accordance with regulations of the Secretary. If such a board finds that such person is not fully qualified

and satisfactory, such person shall be separated from the service.

A summary review board convened to review Dr. Weber's appointment on August 2, 1999. On August 12, 1999, the board issued findings and a recommendation that Dr. Weber be separated from his employment effective September 13, 1999. The board found that no single incident warranted separation, but when considered in its entirety, Dr. Weber's pattern of behavior warranted separation.

On March 8, 2000, Dr. Weber filed a complaint in the United States District Court for the District of Montana, seeking judicial review of the board's recommendation to separate him. He claimed that his separation should be set aside because the board failed to follow VA regulations. Specifically, Dr. Weber alleged that matters were presented to the summary review board that were not included in the notice of summary review sent to Dr. Weber. Without reaching a decision on the merits of the summary review board decision, the district court agreed that the board failed to comply fully with the notice requirements. On June 2, 2004, the court vacated the report and recommendation of the summary review board and remanded the matter to the VA for further proceedings in accordance with the applicable laws and regulations.

See Weber v. VA, No. CV-00-10-H-SEH (D. Mont. filed June 3, 2004) *("Weber I")*.

On June 3, 2004, the VA reinstated Dr. Weber, but then immediately placed him on administrative leave with pay. The VAMC convened a new summary review board, which again recommended that Dr. Weber be separated from his employment. Accordingly, the VAMC discharged Dr. Weber effective December 6, 2005.

In the meantime, on September 15, 2004, Dr. Weber filed a complaint in the United States District Court for the District of Montana against the VA and Anthony J. Principi, the Sec-

retary of Veterans Affairs (collectively, "VA"), claiming he was entitled to back pay and benefits under the Back Pay Act ("BPA"), 5 U.S.C. § 5596, for the period between September 13, 1999, and June 3, 2004. Section 5596(b)(1) provides that back pay is warranted when an employee of an agency "is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay" of the employee. Dr. Weber moved for summary judgment claiming he was entitled to back pay under the BPA by virtue of the district court's prior decision in *Weber I* Conversely, the VA moved to dismiss Dr. Weber's complaint under Fed. R. Civ. P. 12(b)(6), challenging the district court's jurisdiction and arguing that the district court's order in *Weber I* did not provide a basis for asserting a BPA claim.

On February 23, 2006, the district court denied Dr. Weber's summary judgment motion and granted the VA's motion to dismiss Dr. Weber's BPA claim. The court determined that its prior decision in *Weber I* was limited to a narrow procedural issue and that questions relating to Dr. Weber's pay or other benefits were not before the court. Thus, the court found that its decision in *Weber I* afforded no basis for a BPA claim. The court

further stated that its review of the record revealed overwhelming evidence that the summary review board was justified in separating Dr. Weber.

Dr. Weber filed a timely appeal of the district court's order on April 18, 2006. He claims that the district court erred in its determination that the court's prior decision in *Weber I* afforded no basis for Dr. Weber to assert a BPA claim.

II. STANDARD OF REVIEW

We review *de novo* dismissals pursuant to Fed. R. Civ. P. 12(b)(6). *Burgert v. Lokelani Bernice Pauahi Bishop Trust,* 200 F.3d 661, 663 (9th Cir. 2000). To avoid a Rule 12(b)(6)

dismissal, a complaint need not contain detailed factual allegations; rather, it must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).

We also review *de novo* a district court's decision to grant or deny summary judgment. *Prison Legal News v. Lehman*, 397 F.3d 692, 698 (9th Cir. 2005). Using the familiar standard, we view the evidence in the light most favorable to the nonmoving party to determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

III. DISCUSSION

[1] In order for a plaintiff to bring a viable suit against the federal government or its agencies, the government must have waived its sovereign immunity. "Consequently, a person attempting to sue a federal agency or officer must demonstrate that the claim being asserted is covered by a specific statutory authorization to sue the United States . . . ." 14 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3655 (3d ed. 1998). Dr. Weber claims the Administrative Procedure Act ("APA"), 5 U.S.C. § 701-706, and the BPA, 5 U.S.C. § 5596(b)(1), gave the district court jurisdiction over his back pay claim. The VA challenges this assertion, arguing the district court lacked jurisdiction under either act. We agree.

[2] Under the APA, federal sovereign immunity is waived for suits against the federal government in which the plaintiff is "*seeking relief other than money damages.*" 5 U.S.C. § 702 (emphasis added). Section 702 further states, in pertinent part:

> Nothing herein . . . (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Id. The APA did not vest the district court with jurisdiction for two reasons. First, "back pay, as a claim for money damages, falls outside the scope of the APA." *Ward v. Brown*, 22 F.3d 516, 520 (2d Cir. 1994). Second, the comprehensive statutory scheme for the Veterans Health Administration ("VHA") does not permit judicial review of Dr. Weber's claims.

The Supreme Court's reasoning in *United States v. Fausto,* 484 U.S. 439 (1988), controls our analysis. In *Fausto,* the Supreme Court considered whether an administrative officer in the Department of the Interior Fish and Wildlife Service ("FWS") had the right to bring an action in the Federal Court of Claims challenging his removal and seeking back pay under the Civil Service Reform Act ("CSRA") (codified in Title 5 of the United States Code). The FWS had dismissed Fausto from his FWS position in 1981, citing various reasons, including the unauthorized use of a government vehicle. *Id.* at 441. Subsequently, the FWS determined that Fausto's dismissal was unwarranted but imposed a thirty-day suspension for his unauthorized use of the government vehicle. *Id.* The FWS offered Fausto back pay for a limited time period, which did not include his thirty-day suspension. Fausto rejected this offer and filed an appeal with the Department of Interior, arguing that: (1) the suspension was unwarranted and that he was

entitled to back pay for the thirty-day suspension period; and *(2)* he was entitled to additional back pay from the date he was terminated through the date the FWS determined his initial dismissal was unwarranted. The Secretary of the Interior rejected his arguments and upheld the FWS's decision. *Id.* Fausto then filed an action with the Federal Court of Claims pursuant to the BPA. *Id.* at 443. The Claims Court dismissed the action and held that the CSRA provided Fausto's exclusive remedies. Fausto appealed to the United States Circuit Court of Appeals for the Federal Circuit, which reversed and awarded back pay for the suspension period. *Id.* The Supreme Court granted certiorari.

[3] The Court determined that the comprehensive statutory scheme set forth in the CSRA did not provide for judicial review for the actions taken against members of the excepted service, such as Fausto.[1] The Court stated:

> The CSRA established a comprehensive system for reviewing personnel action taken against federal employees. Its deliberate exclusion of employees in respondent's service category from the provisions establishing administrative and judicial review for personnel action of the soil at issue here prevents respondent from seeking review in the Claims Court under the Back Pay Act.

Id. at 453.

[4] Like the statutory scheme analyzed in *Fausto,* Title 38 of the United States Code governs the appointment and employment terms of VA physicians. Dr. Weber was appointed as a VA radiologist under 38 U.S.C. § 7401(1); therefore, his employment was governed by the VHA personnel system. We agree with the Sixth Circuit that "[Bike the CSRA, Title 38 provides a comprehensive regulatory scheme for employees of the VA." *Fligiel v. Samson,* 440 F.3d 747, 752 (6th Cir. 2006). This statutory scheme does not provide for judicial review of the decisions of summary

review boards for probationary employees. *See* 38 U.S.C. §§ 7403(b)(2),

[1]The CSRA classifies workers into three categories: (1) senior executive service; (2) competitive service; and (3) excepted service. "'Senior Executive Service' employees are those who occupy high-level positions in the Executive Department, but for whom appointment by the President and confirmation by the Senate is not required. 5 U.S.C. § 3132(a)(2). 'Competitive service' employees are all other employees for whom nomination by the President and confirmation by the Senate is not required, and who are not specifically excepted from the competitive service by statute or by statutorily authorized regulation. § 2102. 'Excepted service' personnel are the remainder — those who are in neither the competitive service nor the Senior Executive Service. § 2103." *Fausto*, 484 U.S. at 441 n.1.

f)(3). "Under *Fausto*, where a comprehensive remedial scheme exists to address agency adverse actions, and Congress has clearly indicated that no judicial review is available, an individual may not choose other federal statutory avenues to obtain review." *Fligiel*, 440 F.3d at 752 n.2 (citing *Fausto*, 484 U.S. at 455). Therefore, the APA does not provide a basis for Dr. Weber to assert his BPA claim.

[5] In the alternative, Dr. Weber also claims the BPA provides the necessary waiver of sovereign immunity for the district court to hear his back pay claim. " 'The Back Pay Act is the means by which appointed employees subjected to unjustified personnel action are given a cause of action against the United States.' " *Ward*, 22 F.3d at 520 (quoting *United States v. Hopkins*, 427 U.S. 123, 128 (1976)). The BPA provides a waiver of sovereign immunity when:

> An employee of an agency who, on the basis of a timely appeal or an administrative determination .. . is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action . . . .

5 U.S.C. § 5596(b)(1). The requirements to invoke jurisdiction under the BPA are: (1) a finding of "an unjustified or unwarranted personnel action;" (2) by an "appropriate authority." *Id.*

[6] Dr. Weber claims these requirements were satisfied by the district court's decision in *Weber I*, which vacated the first report and recommendation of the summary review board and remanded the matter to the VA for further proceedings. This argument is unavailing because the district court, like the Claims Court in *Fausto*, was not an "appropriate authority" when it made its determination. Just as the "comprehensive and integrated review scheme of the CSRA" prevented Fausto from satisfying the threshold requirements to invoke the BPA,

id., Title 38 prevents probationary physicians such as Dr. Weber from seeking judicial review of summary review board determinations under the BPA. According to VA regulations, after a summary review board makes findings, the Chief of Staff can comment on those findings, and the facility director "may approve, disapprove or modify the [b]oard's recommendation." VHA Supplement, MP-5, Pt. II § 4.09(h)(1)(b). Because the board's determination was but an interim step in a multi-level decision process, Dr. Weber's only recourse was within his agency, not with the district court.[2]

As a final alternative, Dr. Weber claims he had a liberty interest under the Due Process Clause in seeing that the summary review board complied with notice requirements. He argues a district court can invoke jurisdiction when a violation of due process rises to the level of a colorable constitutional claim. Because Dr. Weber did not properly raise this claim before the district court, and no exceptional circumstances justify this failure, we decline to address this claim. *See Rains v. Flinn* (In re Rains), 428 F.3d 893, 902 (9th Cir. 2005)

[2]We express no opinion on whether the district court properly asserted subject matter jurisdiction in *Weber I*.

(finding the plaintiff's due process claim waived on appeal because he first raised the claim before the district court in his reply brief); *see also Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001, 1007 (9th Cir. 2008) (stating that "it is well-established that an appellate court will not consider issues that were not properly raised before the district court") (alterations and internal quotation marks omitted).

[7] For the foregoing reasons, we conclude the district court lacked jurisdiction to adjudicate Dr. Weber's claim for back pay. Accordingly, this case is remanded to the district court with instructions to dismiss Dr. Weber's complaint for lack of

jurisdiction.

VACATED and REMANDED.

APPENDIX 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM N. WEBER, M.D., *Plaintiff-Appellant,* v. DEPARTMENT OF VETERANS AFFAIRS AND ANTHONY J. PRINCIPI, SECRETARY OF VETERANS AFFAIRS, *Defendants-Appellees.*	No. 06-35522 D.C. No. CV 04-046-H-SEH OPINION

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Argued and Submitted
October 19, 2007- Seattle, Washington

Filed January 15, 2008

Before: Ronald M. Gould and Richard A. Paez,
Circuit Judges, and Lyle E. Strom,* District Judge.

Opinion by Judge Strom

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*The Honorable Lyle E. Strom, Senior United States District Judge for the District of Nebraska, sitting by designation.

SUMMARY

Civil Litigation and Procedure/Jurisdiction

The court of appeals vacated a judgment of the district court and remanded. The court held that Title 38 of the United States Code, governing the appointment and employment terms of Veterans Administration (VA) physicians, does not provide for judicial review of the decisions of summary review boards for probationary employees.

Appellant William Weber filed suit in district court in Montana against appellee the Department of Veterans Affairs, seeking back pay under the Back Pay Act and the Administrative Procedure Act (APA) for a time period between his 1999 separation from his staff radiologist position at a VA center and his 2004 reinstatement. Weber was appointed to his position subject to a two-year probationary period and to summary board review; the board recommended Weber's separation from his position within the two-year period. Weber claimed that he was entitled to back pay based on the district court's prior decision vacating the review board's separation recommendation for failure to comply with notice requirements. In the present case, the district court granted summary judgment in favor of the VA, finding that its prior decision afforded no

basis for a BPA claim.

Weber appealed.

[1] In order for a plaintiff to bring a viable suit against the federal government or its agencies, the government must have waived its sovereign immunity. Consequently, a person attempting to sue a federal agency or officer must demonstrate that the claim being asserted is covered by a specific statutory authorization to sue the United States. [2] Under the APA, federal sovereign immunity is waived for suits against the federal government in which the plaintiff is seeking relief

other than money damages [3] In a case in which a federal administrative officer brought a federal action challenging his removal and seeking back pay under the Civil Service Reform Act (CSRA), the Supreme Court determined that the comprehensive statutory scheme set forth in the CSRA did not provide for judicial review for the actions taken against members of the excepted service, such as the administrative officer. [4] Title 38 of the United States Code governs the appointment and employment terms of VA physicians. Weber was appointed as a VA radiologist under 38 U.S.C. § 7401(1); therefore, his employment was governed by the Veterans Health Administration personnel system. Like the CSRA, Title 38 provides a comprehensive regulatory scheme for employees of the VA. This statutory scheme does not provide for judicial review of the decisions of summary review boards for probationary employees. Therefore, the APA did not provide a basis for Weber to assert his BPA claim.

[5] The BPA provides a waiver of sovereign immunity, which can be invoked by: (1) a finding of an unjustified or unwarranted personnel action; (2) by an appropriate authority. [6] Title 38 prevents probationary physicians such as Weber from seeking judicial review of summary review board determinations under the BPA. Because the board's determination was but an interim step in a multi-level

decision process, Weber's only recourse was within his agency, not with the district court. [7] It had to be concluded that the district court lacked jurisdiction to adjudicate Weber's claim for back pay. Weber's case had to be remanded to the district court with instructions to dismiss Weber's complaint for lack of jurisdiction.

COUNSEL

Bruce M. Spencer, Smith Law Firm, P.C., Helena, Montana, for plaintiff-appellant William N. Weber, M.D.

William W. Mercer, Assistant United States Attorney, Great Falls, Montana, for defendants-appellees Department of Veterans Affairs and Anthony J. Principi, Secretary of Veterans Affairs.

OPINION

STROM, District Judge:

Appellant Dr. William Weber ("Dr. Weber") appeals from the February 23, 2006, order of the United States District Court for the District of Montana denying his motion for summary judgment on his claim for back pay under the Back Pay Act, 5 U.S.C. § 5596, and granting appellees' motion to dismiss Dr. Weber's claim.

I. BACKGROUND

On October 1, 1997, Dr. Weber was appointed to the position of staff radiologist at the Veterans Administration Medical and Regional Center ("VAMC") in Fort Harrison, Montana, pursuant to 38 U.S.C. § 7401(1). Dr. Weber's appointment was initially temporary, but the VAMC converted the position to a full-time staff position on December 7, 1997. As mandated by 38 U.S.C. §§ 7403(b)(1) and (2), Dr.Weber's appointment was subject to a two-year probationary period and to board review. Section 7403(b)(2) states, in pertinent part:

The record of each person serving under such an appointment in the [m]edical . . . [s]ervices shall be reviewed from time to time by a board, appointed in accordance with regulations of the Secretary. If such a board finds that such person is not fully qualified and satisfactory, such person shall be separated from the service.

A summary review board convened to review Dr. Weber's appointment on August 2, 1999. On August 12, 1999, the board issued findings and a recommendation that Dr. Weber be separated from his employment effective September 13, 1999. The board found that no single incident warranted separation, but when considered in its entirety, Dr. Weber's pattern of behavior warranted separation.

On March 8, 2000, Dr. Weber filed a complaint in the United States District Court for the District of Montana, seeking judicial review of the board's recommendation to separate him. He claimed that his separation should be set aside because the board failed to follow VA regulations. Specifically, Dr. Weber alleged that matters were presented to the summary review board that were not included in the notice of summary review sent to Dr. Weber. Without reaching a decision on the merits of the summary review board decision, the district court agreed that the board failed to comply fully with the notice requirements. On June 2, 2004, the court vacated the report and recommendation of the summary review board and remanded the matter to the VA for further proceedings in accordance with the applicable laws and regulations. *See Weber v. VA*, No. CV-00-10-H-SEH (D. Mont. filed June 3, 2004) (*"Weber I"*).

On June 3, 2004, the VA reinstated Dr. Weber, but then immediately placed him on administrative leave

with pay. The VAMC convened a new summary review board, which again recommended that Dr. Weber be separated from his employment. Accordingly, the VAMC discharged Dr. Weber effective December 6, 2005.

In the meantime, on September 15, 2004, Dr. Weber filed a complaint in the United States District Court for the District of Montana against the VA and Anthony J. Principi, the Secretary of Veterans Affairs (collectively, "VA"), claiming he was entitled to back pay and benefits under the Back Pay Act ("BPA"), 5 U.S.C. § 5596, for the period between September

13, 1995, and June 3, 2004. Section 5596(b)(1) provides that back pay is warranted when an employee of an agency "is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay" of the employee. Dr. Weber moved for summary judgment claiming he was entitled to back pay under the BPA by virtue of the district court's prior decision in *Weber I*. Conversely, the VA moved to dismiss Dr. Weber's complaint under Fed. R. Civ. P. 12(b)(6), challenging the district court's jurisdiction and arguing that the district court's order in *Weber I* did not provide a basis for asserting a BPA claim.

On February 23, 2006, the district court denied Dr. Weber's summary judgment motion and granted the VA's motion to dismiss Dr. Weber's BPA claim. The court determined that its prior decision in *Weber I* was limited to a narrow procedural issue and that questions relating to Dr. Weber's pay or other benefits were not before the court. Thus, the court found that its decision in *Weber I* afforded no basis for a BPA claim. The court further stated that its review of the record revealed overwhelming evidence that the summary review board was justified in separating Dr. Weber.

Dr. Weber filed a timely appeal of the district court's order on April 18, 2006. He claims that the district court erred in its determination that the court's prior decision in *Weber I* afforded no basis for Dr. Weber to assert a BPA claim.

II. STANDARD OF REVIEW

We review *de novo* dismissals pursuant to Fed. R. Civ. P. 12(b)(6). *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000). To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual allegations; rather, it must plead "enough facts to state a claim to

relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).

We also review *de novo* a district court's decision to grant or deny summary judgment. *Prison Legal News v. Lehman*, 397 F.3d 692, 698 (9th Cir. 2005). Using the familiar standard, we view the evidence in the light most favorable to the nonmoving party to determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

III. DISCUSSION

[1] In order for a plaintiff to bring a viable suit against the federal government or its agencies, the government must have waived its sovereign immunity. "Consequently, a person attempting to sue a federal agency or officer must demonstrate that the claim being asserted is covered by a specific statutory authorization to sue the United States . .. ." 14 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3655 (3d ed. 1998). Dr. Weber claims the Administrative Procedure Act ("APA"), 5 U.S.C. § 701-706, and the BPA, 5 U.S.C. § 5596(b)(1), gave the district court jurisdiction over his back pay claim. The VA challenges this assertion, arguing the district court lacked jurisdiction under either act. We agree.

[2] Under the APA, federal sovereign immunity is waived for suits against the federal government in which the plaintiff is "*seeking relief other than money damages.*"

5 U.S.C. § 702 (emphasis added). Section 702 further states, in pertinent part:

> Nothing herein . . . (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Id. The APA did not vest the district court with jurisdiction for two reasons. First, "back pay, as a claim for money dam-

ages, falls outside the scope of the APA." *Ward v. Brown*, 22 F.3d 516, 520 (2d Cir. 1994). Second, the comprehensive statutory scheme for the Veterans Health Administration ("VHA") does not permit judicial review of Dr. Weber's claims.

The Supreme Court's reasoning in *United States v. Fausto*, 484 U.S. 439 (1988), controls our analysis. In *Fausto*, the Supreme Court considered whether an administrative officer in the Department of the Interior Fish and Wildlife Service ("FWS") had the right to bring an action in the Federal Court of Claims challenging his removal and seeking back pay under the Civil Service Reform Act ("CSRA") (codified in Title 5 of the United States Code). The FWS had dismissed Fausto from his FWS position in 1981, citing various reasons, including the unauthorized use of a government vehicle. *Id.* at 441. Subsequently, the FWS determined that Fausto's dismissal was unwarranted but imposed a thirty-day suspension for his unauthorized use of the government vehicle. *Id.* The FWS offered Fausto back pay for a limited time period, which did not include his thirty-day suspension. Fausto rejected this offer and filed an appeal with the Department of Interior, arguing that: (1) the suspension was unwarranted and that he was entitled to back pay for the thirty-day suspension period; and (2) he was entitled to additional back pay from the date he was terminated through the date the FWS determined his initial dismissal was unwarranted. The Secretary of the Interior rejected his arguments and upheld the FWS's decision. *Id.* Fausto then filed an action with the Federal Court of Claims

pursuant to the BPA. *Id.* at 443. The Claims Court dismissed the action and held that the CSRA provided Fausto's exclusive remedies. Fausto appealed to the United States Circuit Court of Appeals for the Federal Circuit, which reversed and awarded back pay for the suspension period. *Id.* The Supreme Court granted certiorari.

[3] The Court determined that the comprehensive statutory scheme set forth in the CSRA did not provide for judicial

review for the actions taken against members of the excepted excepted service, such as Fausto.[1] The Court stated:

> The CSRA established a comprehensive system for reviewing personnel action taken against federal employees. Its deliberate exclusion of employees in respondent's service category from the provisions establishing administrative and judicial review for personnel action of the sort at issue here prevents respondent from seeking review in the Claims Court under the Back Pay Act.

Id. at 453.

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[1]The CSRA classifies workers into three categories: (1) senior executive service; (2) competitive service; and (3) excepted service. " 'Senior Executive Service' employees are those who occupy high-level positions in the Executive Department, but for whom appointment by the President and confirmation by the Senate is not required. 5 U.S.C. § 3132(a)(2). 'Competitive service' employees are all other employees for whom nomination by the President and confirmation by the Senate is not required, and who are not specifically excepted from the competitive service by statute or by statutorily authorized regulation. § 2102. 'Excepted service' personnel are the remainder — those who are in neither the competitive service nor the Senior Executive Service. § 2103." *Fausto*, 484 U.S. at 441 n.1.

[4] Like the statutory scheme analyzed in *Fausto*, Title 38 of the United States Code governs the appointment and employment terms of VA physicians. Dr. Weber was appointed as a VA radiologist under 38 U.S.C. § 7401(1); therefore, his employment was governed by the VHA personnel system. We agree with the Sixth Circuit that "[l]ike the CSRA, Title 38 provides a comprehensive regulatory scheme for employees of the VA." *Fligiel v. Samson*, 440 F.3d 747, 752 (6th Cir. 2006). This statutory scheme does not provide for judicial review of the decisions of summary review boards for probationary employees. *See* 38 U.S.C. §§ 7403(b)(2), (f)(3). "Under *Fausto*, where a comprehensive remedial scheme exists to address agency adverse actions, and Con-

gress has clearly indicated that no judicial review is available, an individual may not choose other federal statutory avenues to obtain review." *Fligiel,* 440 F.3d at 752 n.2 (citing *Fausto,* 484 U.S. at 455). Therefore, the APA does not provide a basis for Dr. Weber to assert his BPA claim.

[5] In the alternative, Dr. Weber also claims the BPA

provides the necessary waiver of sovereign immunity for the district court to hear his back pay claim. " `The Back Pay Act is the means by which appointed employees subjected to unjustified personnel action are given a cause of action against the United States.' " *Ward,* 22 F.3d at 520 (quoting *United States v. Hopkins,* 427 U.S. 123, 128 (1976)). The BPA provides a waiver of sovereign immunity when:

> An employee of an agency who, on the basis of a timely appeal or an administrative determination .. . is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action ... .

5 U.S.C. § 5596(b)(1). The requirements to invoke jurisdiction under the BPA are: (1) a finding of "an

unjustified or unwarranted personnel action;"
(2) by an "appropriate authority." I*d.*

[6] Dr. Weber claims these requirements were satisfied by the district court's decision in *Weber 1,* which vacated the first report and recommendation of the summary review board and remanded the matter to the VA for further proceedings. This argument is unavailing because the district court, like the Claims Court in *Fausto,* was not an "appropriate authority" when it made its determination. Just as the "comprehensive and integrated review scheme of the CSRA" prevented Fausto from satisfying the threshold requirements to invoke the BPA, *id.,* Title 38 prevents probationary physicians such as Dr. Weber from seeking judicial review of summary review board

determinations under the BPA. According to VA regulations, after a summary review board makes findings, the Chief of Staff can comment on those findings, and the facility director "may approve, disapprove or modify the [b]oard's recommendation." VHA Supplement, MP-5, Pt. II § 4.09(h)(1)(b). Because the board's determination was but an interim step in a multi-level decision process, Dr. Weber's only recourse was within his agency, not with the district court.[2]

As a final alternative, Dr. Weber claims he had a liberty interest under the Due Process Clause in seeing that the summary review board complied with notice requirements. He argues a district court can invoke jurisdiction when a violation of due process rises to the level of a colorable constitutional claim. Because Dr. Weber failed to raise this claim before the district court, and no exceptional circumstances justify this failure, we decline to address this claim. *See Monetary II Ltd. P'ship v. Comm'r,* 47 F.3d 342, 347 (9th Cir. 1995)

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[2]We express no opinion on whether the district court properly asserted subject matter jurisdiction in *Weber I.*

(internal quotation marks omitted) (stating "[a]s a general rule, an appellate court will not consider arguments which were not first raised before the district court, absent a showing of exceptional circumstances").

[7] For the foregoing reasons, we conclude the district court lacked jurisdiction to adjudicate Dr. Weber's claim for back pay. Accordingly, this case is remanded to the district court with instructions to dismiss Dr. Weber's complaint for lack of jurisdiction.

VACATED and REMANDED.

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

WILLIAM N. WEBER, M.D., Plaintiff, vs. DEPARTMENT OF VETERANS AFFAIRS AND ANTHONY J. AND ANTHONY J. PRINCIPI, SECRETARY OF VETERANS AFFAIRS, Defendants.	No. CV 04-46-H-SEH **ORDER**

Introduction

This employment arises out of Plaintiff William N. Weber, M.D.'s (Weber) employment and discharge as a staff radiologist at the Veterans Administration Medical and Regional Office Center (VAMC), Helena, Montana. It is now before the Court for the third time as a claim by Weber for back pay under the Back Pay Act, 5 U.S.C. § 5596 (BPA).

In the first proceeding, Weber v. V.A., Cause No. CV-00-10-H-SEH, (CV-00-10), the Court set aside the report and recommendation of a Summary Review Board, which had recommended termination of Weber as a probationary employee at VAMC. (Memorandum and Order, (June 3, 2004((CV-00-10.)) In the second proceeding, Weber v. Nicholson, Cause No. CV-02-10-H-SEH (CV-02-10), the Court, following trial on the merits, dismissed Weber's age discrimination claim against the Veterans Administration (VA). (Findings of Fact, Conclusions of Law and Order, (Nov. 15, 2005); Judgment, (Nov. 16, 2005)(CV-02-10).)[1]

Discussion

Pending before the Court are motions by both parties: by Weber for summary judgment on his claim for back pay; and by Defendants to dismiss under Fed. R. Civ. P. 12(b)(6) or alternatively, on *res judicata* grounds. The parties are agreed the record for ruling on both motions is complete.

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[1]On January 3, 2006, Weber appealed the judgment of dismissal to the Ninth Circuit Court of Appeals. The appeal is pending.

A claim for back pay under the BPA is viable if:

An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee -

5 U.S.C. § 5596(b)(1).

Weber contends this Court's decision in CV-00-10 -- that the Summary Review Board report and recommendation be vacated and the case remanded to the VA for further proceedings — satisfies, as a matter of law, all the several components of the BPA. Defendant asserts a fundamentally opposing argument, namely, the decision in CV-00-10 affords no basis for a back pay claim. The Defendants' position is correct.

Weber reads into the June 3, 2004, decision that which is not there. The matter before the Court in CV-00-10 was limited to a narrow issue of regulatory procedure. The decision addressed only the procedural question. At no time did the Court consider or resolve, expressly

or by implication, issues of "withdrawal or reduction" of Weber's pay or other benefits. Both were clearly beyond the pale of the case.

The BPA does not, of itself, clothe this Court with jurisdiction over the back pay claim. Allen v. Dept of Air Force, 694 F. Supp. 1527 (W.D. Okla. 1988). I also deem the premise that this Court is an "appropriate authority" to make a decision on BPA issues to be extremely doubtful. See VHA Supplement to VA Personnel Policy Manual MP-5, Part II, § 4.09(h)(1998); Bell v. U.S., 23 Cl. Ct. 73 (1991); U.S. v. Fausto, 484 U.S. 439, 454 (1988). In any event, given the limited scope of the proceedings and decision in CV-00-10, and the language of the applicable VA regulations, which make clear that the decision and recommendations of the Summary Review Board was but an interim step in a multi-level decision process, see VHA Supplement to VA Personnel Polley Manual MP-5, Part II, § 4.09(h), I deem it unnecessary to reach the "appropriate authority" issue.

Notwithstanding that the record in CV-00-10 was overwhelming with evidence of justification for Weber's separation as a probationary employee, I likewise find it unnecessary, for the reasons stated above, to address Defendants' *res judicata* argument.

Conclusion

The June 3, 2004, decision in CV-00-10 affords no basis for a claim for back pay under the BPA. Defendants are entitled to judgment dismissing the complaint.

ORDERED:

1. Defendants' Motion to Dismiss[2] is GRANTED.

2. Plaintiff's Motion for Summary Judgement[3] is DENIED.

3. The status conference schedule for March 3, 2006, is VACATED.

DATED this 23rd day of February, 2006.

s/
SAM E. HADDON
United States District Judge

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[2]Docket No. 24.

[3]Docket No. 26.

APPENDIX 4

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

WILLIAM N. WEBER, M.D., Plaintiff, vs. DEPARTMENT OF VETERANS AFFAIRS and ANTHONY J. PRINCIPI, SECRETARY OF VETERANS AFFAIRS, and ROBERT H., ROSWELL, M.D. UNDER SECRETARY FOR HEALTH, Defendants.	No. CV-00-10-H-SEH MEMORANDUM AND ORDER

INTRODUCTION

This action seeks judicial review of the decision of the Department of Veteran Affairs (VA) to terminate Plaintiff William N. Weber's (Weber's) employment as a radiologist at the VA Medical Center at Fort Harrison, Montana. This Court has jurisdiction under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 and 28 U.S.C. § 1331.

BACKGROUND

Weber was employed on a probationary basis as a radiologist at the Fort Harrison VA Medical Center in October of 1997. Conflicts between Weber and his supervisor, Dr. Lou Arvanetes, arose shortly after he was hired.

On January 14, 1999, a complication arose during a lung biopsy of one of Weber's patients. The incident was investigated by an Administrative Board of Investigation (Administrative Board). The Administrative Board concluded that Weber may have been negligent but that no cause existed to discharge him. Peer reviews were conducted later on a number of Weber's cases by an outside review panel. After the peer reviews were completed, a 38 U.S.C. § 7403(b) Summary Review proceeding was commenced to determine whether Weber should be retained.

The Summary Review was conducted on August 2, 1999, following notice given on June 23, 1999. Weber was represented by counsel. No verbatim record of the proceeding was made. The Summary Review Board issued its Findings and Recommendation on August 12, 1999. The Recommendation stated in part:

> The recommendation of the Professional Standards Board is that Dr. Weber be separated

> from his employment with the VA Montana Healthcare System during probation for the above reasons. While no single event recounted to the Board or demonstrated by the evidence appears to warrant removal, taken as a whole the pattern of behavior, attitude toward correction, and erosion of staff confidence lead the Board to conclude that his retention beyond the probationary period would prohibit the effective functioning of the Radiology Department.

(Ex. 1, p. 5 to Pl's Br. in Supp. of Judicial Review (Dec. 5, 2003.) Weber was terminated on September 13, 1999. The present action was instituted on March 8, 2000.[1]

Both parties have moved for summary disposition, the VA by motion to dismiss and for summary judgment, and Weber by request for judicial review. The parties have stipulated the record is complete. Briefs have been filed. A hearing was held on May 28, 2004.

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1. On July 9, 2002, Weber filed a second action (Weber v. Dept. of Veteran Affairs, *et al.*, CV-02-10-H-DWM) relating to his discharge in which be asserted age discrimination and retaliation claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 through 2000e-16.

DISCUSSION

Defendants' Motion to Dismiss

The VA asserts the case should be dismissed for lack of subject matter jurisdiction because: 1) the ADEA provides an adequate remedy for the improprieties alleged in this case; and 2) 5 U.S.C. § 704 bars judicial review under the APA where an alternate remedy is available under the law.[2] Neither ground warrants dismissal.

Weber seeks relief from the Summary Review Board's failure to follow its own regulations. He does not assert in this action that the VA or the Summary Review Board engaged in discriminatory conduct. The ADEA does not provide a remedy of judicial review of administrative action. The ADEA simply cannot remedy the wrong alleged from the challenged conduct.

Weber's Request for Judicial Review- Defendants' Motion for Summary Judgement

The Court will address Weber's Brief in Support of Judicial Review and the VA's Motion for Summary Judgement as cross-motions for summary judgement.

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2. Section 704 of Title 5 precludes judicial review under the APA where the plaintiff has an "adequate remedy in a court." 5 U.S.C. § 704 (2000); Bowen v. Massachusetts, 487 U.S. 879, 901-903 (1988); Tucson Airport Auth. V. General Dynamics Corp., 136 F.3d 641, 645 (9th Cir. 1988).

Both motions are directed to the question of whether the Summary Review Board's decision and Weber's resulting termination should be set aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A)(2000); Center for Biological Diversity v. Veneman, 335 F.3d 849, 853 (9th Cir. 2003).

Weber challenges the Summary Review Board's decision on four grounds. One of those grounds is dispositive, namely that the Summary Review Board violated VA regulations by considering charges against Weber that had not been included in the notice of Summary Review. Regulations governing Summary Board reviews require notice to an employee in advance of the Summary Review proceeding. The notice must state the reasons for the review.

(Ex. 2, Section 4.09(e) to Def's Mot. To Dismiss or in the Alternative for Summ. J. (Jan. 20, 2004)(VHA Supp.).) Section 4.09(e)(2) states, in pertinent part:

> (e.) Notice to Employee of Board Review. . . The notice will be in writing, prepared for the signature of the Chairperson of the Board and indicate:
>
> . . . .

(2) The reasons for the review briefly, but in sufficient detail for the employee to clearly understand why he or she may not be fully qualified and satisfactory.

The regulations likewise prohibit a Summary Review Board from considering evidence of matters not disclosed in the notice unless the notice to the employee is reissued. VHA Supp., Section 4.09(e) states, *inter alia*:

> NOTE: Additional evidence that forms the basis for new reasons upon which to base the summary review acquired after the notice of summary review has been issued will not be considered in the summary review unless the notice of summary review has been reissued. The employee or employee's representative shall be provided with copies of any reissued notice of summary review.

The June 23, 1999, notice identified five "alleged deficiencies" to be reviewed during the Summary Review proceeding:

1. The results of a quality assurance peer review of twenty-five of Weber's cases for the quarter ending December 1998;

2. The results of a second peer review of Weber's cases by an outside review panel;

3. The Administrative Board's investigation into the lung biopsy incident;

4. Interpersonal conflicts between Weber and other staff members;[3] and

5. Four letters of counseling concerning inappropriate professional conduct (Unapproved leave).

Weber asserts, and the VA does not dispute, that ten matters were presented to the Summary Review Board which were not disclosed in the notice.[4]

---

3. Reference to this topic appears to have come about from review of the lung biopsy Administrative Board report by the Chairman of the Professional Standards Boards who prepared and sent the notice. That report (attached to the Declaration of Bonnie M. Anderson) itself noted that the "Board does not have specific recommendations" for resolving apparent "interpersonal disputes." (Ex. 13, p. 8 to Defs.' Mem. In Supp. of Mot. To Dismiss or in the Alternative Mot. For Summ. J. (Jan. 20, 2004).)

4. The undisclosed matters were: 1) that Weber did not get along with female physicians; 2) that Weber began to check in and out with a supervisory technician by "getting in his face;" 3) that Weber was found "cat napping" in his office; 4) that Weber had told a technician that he had bought a hunting rifle to "shoot people like you;" 5) that a technician had to assist Weber in putting together a chest tube; 6) that Weber's sterile technique was questionable; 7) that Weber hung a banana peel on a wall; 8) that certain technicians complained about Weber's needle biopsy technique; 9) that Weber was trying to segregate the radiology team; and 10) that Weber was attempting to undermine Dr. Arvanetes' position in the radiology department. (Pl.'s Br. In Supp. Of Judicial Review, pp. 12-13 (Dec. 5. 2003).)

A significant part of the matters not disclosed in the notice are not referenced in the Summary Review Board's report. No conclusion can be drawn that any of these matters played a part in the Board's recommendation. On the other hand, two of the undisclosed matters- that Weber had checked in and out with a supervisory technician by "getting in his face" and that Weber had been found "cat napping" by staff- are included in the findings of the Summary Review Board.

The VA's Summary Review Board regulations establish specific procedures to be followed before conducting a review which could result in summary separation of a probationary employee. Those procedures, in the absence of a reissued notice, require the review to be limited to matters disclosed in the notice. (VHA Supp., Section 4.09(e)(7).) The record is clear the Summary Review Board in this case neither reissued the notice nor limited itself to consideration of those matters included in the June 23, 1999, notice. In doing so it violated VHA Supp., Section 4.09(e)(7).

The significance and effect of the consideration of the undisclosed matters by the Summary Review Board cannot be determined from the record. The court certainly cannot conclude that the Summary Review Board would have recommended termination if the

undisclosed material had not been taken into account. The Court, therefore, is obliged to find the VA's termination to be arbitrary, capricious and not in accordance with law. 5 U.S.C. § 706(2)(A); Veneman, 335 F.3d at 853; People of State of California v. F.C.C., 905 F.2d 1217, 1230 (9th Cir. 1990).

ORDER

1. Defendants' Motion to Dismiss or in the Alternative Motion for Summary Judgement[5] is DENIED.

2. Plaintiff's Brief in Support of Judicial Review, which was treated as a Motion for Summary Judement,[6] is GRANTED.

3. The report and recommendation of the Summary Review Board is VACATED and this matter is REMANDED to the VA for further proceedings in accordance with applicable law and regulations.

DATED this 2nd day of June, 2004.

s/

SAM E. HADDON
United States District Judge

5. Docket No. 52

6. Docket No. 49

APPENDIX 5

Westlaw
22 F.3d 516
22 F.3d 516
(Cite as: 22 F.3d 516)

United States Court of Appeals, Second Circuit.
William J. WARD, Plaintiff-Appellee,
v.
Jesse BROWN, in his capacity as Secretary of the Department of Veterans Affairs; Department of Veterans Affairs, an executive agency of the United States of America; and Michael Lawson, in his capacity as Medical Center Director, Veterans Administration Medical Center,
Defendants-Appellants.
No. 237, Docket 93-6044.

Argued Sept. 30, 1993.
Decided May 2, 1994.

Former nurse sought review of decision of Secretary of Department of Veterans Affairs (VA) approving nurse's discharge. The United States District Court for the Western District of New York, Larimer, J., entered judgment remanding case to Secretary to redetermine appropriate penalty for nurse's misconduct. Government appealed. The Court of Appeals, Cardamone, Circuit.

Judge, held that: (1) Administrative Procedures Act (APA) and Back Pay Act provided waivers of sovereign immunity for nurse's claims, independent of Tucker Act, for purposes of removing claims from exclusive jurisdiction of Court of Federal Claims, and (2) Secretary acted arbitrarily and capriciously by accepting discharge as sanction for nurse's verbal abuse of patient, absent consideration of VA regulation mandating like penalties for like offenses.

Affirmed as modified and remanded.

West Headnotes

[1] Federal Courts 170B 192
170B Federal Courts
170BIII Federal Question Jurisdiction
170BIII(C) Cases Arising Under Laws of the United States
170Bk192k. Particular Cases and Questions.
Most Cited Cases

Federal Courts 170B 1139
170B Federal Courts

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170BXIII Concurrent and Conflicting Jurisdiction and Comity as Between Federal Courts

170Bk1131 Exclusive or Concurrent Jurisdiction

170Bk1139 k. United States, Claims Against in General. Most Cited Cases

United States 393 125(3)

393 United States

3931X Actions

393k125 Liability and Consent of United States to Be Sued

393k125(3) k. Necessity of Waiver or Consent. Most Cited Cases

District court has jurisdiction over case under federal question jurisdiction statute, even if case is against government for more than $10,000 so that it could have been brought in Court of Federal Claims under Tucker Act, so long as there is both grant of subject matter jurisdiction and statute other than Tucker Act providing independent waiver of sovereign immunity. 28 U.S.C.A. §§ 1331, 1346, 1491.

[2] Federal Courts 170B 974.1

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170B Federal Courts
170BIX District Courts
170BIX(A) In General
170Bk974.1 k. Claims Against the United States
170Bk974.1 k. In General. Most Cited Cases

Federal Courts 170B 1139
170B Federal Courts
170BXIII Concurrent and Conflicting Jurisdiction and Comity as Between Federal Courts
170Bk1131 Exclusive or Concurrent Jurisdiction
170Bkl139 k. United States, Claims Against in General. Most Cited Cases

United States 393 125(17)
393 United States
3931X Actions
393k125 Liability and Consent of United States to Be Sued
393k125(17) k. Declaratory Judgment. Most Cited Cases

United States 393 125(18)
393 United States
393IX Actions

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393k125 Liability and Consent of United States to Be Sued

393k125(18) k. Injunction. Most Cited Cases

Administrative Procedures Act (APA) provided waiver of sovereign immunity for claims for declaratory and injunctive relief against Department of Veterans Affairs (VA), independent of Tucker Act's waiver of sovereign immunity, for purposes of supporting district court's jurisdiction over claims and removing them from exclusive jurisdiction of Court of Federal Claims. 5 U.S.C.A. § 702; 28 U.S.C.A. §§ 1346, 1491.

[3] Federal Courts 170B 974.1

170B Federal Courts

170BIX District Courts

170BIX(A) In General

170Bk974 Claims Against the United States

170Bk974.1k. In General. Most Cited Cases

Federal Courts 170B 1139

170B Federal Courts

170BXIII Concurrent and Conflicting Jurisdiction and Comity as Between Federal Courts

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170Bk1131 Exclusive or Concurrent Jurisdiction
170Bk1139 k. United States, Claims Against in General. Most Cited Cases

United States 393 125(9)
393 United States
3931X Actions
393k125 Liability and Consent of United States to Be Sued
393k125(9) k. Nature of Action in General. Most Cited Cases

United States 393 125(30)
393 United States
393IX Actions
393k125 Liability and Consent of United States to Be Sued
393k125(28) Particular Departments, Officers, or Agencies, Suits Against
393k125(30) k. Defense Department. Most Cited Cases

Back Pay Act provided waiver of sovereign immunity for former government employee's claim for back pay against Department of Veterans Affairs (VA),

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independent of Tucker Act's waiver of sovereign immunity, which provided district court with jurisdiction over claim and removed it from exclusive jurisdiction of Court of Federal Claims. 5 U.S.C.A. § 5596; 28 U.S.C.A. §§ 1346, 1491.

[4] Administrative Law and Procedures 15A 683

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak681 Further Review
15Ak683 k. Scope. Most Cited Cases

On appeal from district court's review of claim under Administrative Procedures Act (APA), Court of Appeals accords no deference to lower court's decision, but instead conducts de novo review of administrative record and renders its own independent judgment. 5 U.S.C.A § 706(2)(A).

[5] Administrative Law and Procedure 15A 741

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak741 k. In General. Most Cited Cases

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Although narrow, appellate review of administrative record must nonetheless be careful, thorough and probing.

[6] United States 393 36

393 United States

3931 Government in General

393k36 k. Appointment or Employment and Tenure of Agents, Clerks, and Employees in General. Most Cited Cases

Secretary of Department of Veterans Affairs (VA) acted arbitrarily and capriciously by accepting proposed penalty of discharge as sanction for nurse's verbal abuseof patient, absent consideration, at any time during administrative process, of Secretary's own regulation mandating that VA employees be given like penalties for
like offenses. 38 U.S.C.(1988 Ed.)§ 4110(d).

[7] United States 393 36

393United States

393I Government in General

393k36 k. Appointment or Employment and Tenure of Agents, Clerks, and Employees in General.

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Most Cited Cases

Nurse's failure to bring evidence of sanctions imposed in other disciplinary cases to attention of Department of Veterans Affairs' (VA) Disciplinary Board did not excuse Board's failure to consider such evidence pursuant to VA regulation mandating that VA employees be given like penalties for like offenses. 38 U.S.C.(1988 Ed.) § 4110(d).

[8] United States 393 36

393 United States

393I Government in General

393k36 k. Appointment or Employment and Tenure of Agents, Clerks, and Employees in General.

Most Cited Cases

Failure of Secretary of Department of Veterans Affairs(VA) to consider VA regulation before approving discharge of nurse required remand of nurse's action to Secretary rather than allowing district court to determine whether discharge was consistent with VA policy.

***517** Douglas Ross, Atty., Appellate Staff, Civil Div., Dept. of Justice, Washington, DC (William Kanter,

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Appellate Staff, Civil Div.; Stuart E. Schiffer, Acting Asst. Atty. Gen., Dennis C. Vacco, U.S. Atty., Dept. of Justice, Washington, DC, of counsel), for appellants.

Martin R. Cohen, Asst. Gen. Counsel, American Federation of Government Employees, Bala Cynwyd, PA (Mark D. Roth, Gen. Counsel, American Federation of Government Employees, Washington, DC, of counsel), for appellee.

Before: LUMBARD, CARDAMONE, and LAY [FN*], Circuit Judges.

FN* Hon. Donald P. Lay, United States Court of Appeals for the Eighth Circuit, sitting by designation.

CARDAMONE, Circuit Judge:
Plaintiff, a male registered nurse employed at a Veterans Administration Medical Center in upstate New York was found, after an administrative hearing, on a single occasion to have verbally abused a patient. For this infraction of the rules as set forth in the agency's policy manual, the Secretary of Veterans

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Affairs (Secretary), accepting the administrative decisions and recommendations of subordinate officials of the Department of Veterans Affairs (VA), terminated plaintiffs employment. When the district court vacated the Secretary's decision, the VA appealed.

The VA's apparent objective, like that expressed by Gilbert and Sullivan in the "Mikado", is to let the punishment fit the crime. [FN1] We know this is the VA's objective not only because it accords with basic notions of fairness, but because the VA's policy manual itself also so provides. Nonetheless, the principal question before us is whether the VA followed this policy and adopted a punishment that fits the offense.

FN1. My object all sublime
I shall achieve in time,
To let the punishment fit the crime,
The punishment fit the crime.
W. Gilbert & A. Sullivan, *My Object All Sublime,in A Treasury of Gilbert and Sullivan* 284 (Simon & Shuster eds., 1941).

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BACKGROUND

William Ward worked as a registered nurse with psychiatric patients at the Veterans Administration Medical Center in Canandaigua, New York from December 14, 1981 until he was discharged on December 3, 1990. He was fired after two nursing assistants and a registered nurse who was Ward's supervisor filed written incident reports alleging that nearly two weeks earlier, on March 31, 1989, Ward had verbally abused three patients. The record indicates that on the morning of the alleged incidents Ward had reprimanded the two nursing assistants for leaving a suicidal patient with a shaving razor unattended while they smoked cigarettes in a shower room, in violation of VA policies. The record also shows that Ward was an active union officer and had filed numerous grievances against his supervisor for unfair labor practices. A three-member panel conducted an administrative investigation between April 21 and July 7, 1989, and concluded all three incidents were substantiated. It recommended Ward be discharged.

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The Associate Deputy Chief Medical Director of the Veterans Administration Department of Medicine and Surgery (Department) sent Ward a letter of proposed discharge on September 25, 1989. Plaintiff exercised ***518** his rights under 38 U.S.C. § 4110 (1988) [FN2] and requested a hearing before the Department's Disciplinary Board (Board). The Board, comprised of three nurses from other VA facilities, conducted a hearing from March 19 to 21, 1990. It determined that only one of the three charges against Ward was sustained. But it specifically found Ward had committed major patient abuse by "intentionally teasing, speaking harshly to, and threatening and intimidating the patient," and recommended discharge as the penalty. The Chief Medical Director adopted the Board's decision and recommendation as his own. In December 1990 Ward appealed the Chief Medical Director's decision to the Secretary.

FN2. This section was repealed by Pub. L. 102-40, 105 Stat. 210 (1991), as part of a complete revision of chapter 73 of title 38. Similar provisions are
recodified at 38 U.S.C. §§ 7461-7464 (Supp. III 1991).

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While the appeal was pending, Ward's union submitted to the Secretary an opinion of an Administrative Law Judge (ALJ) of the Federal Labor Relations Authority in a related unfair labor practice proceeding. This action had been brought by Ward's union on his behalf and on behalf of David Bellomo, another employee at the Canandaigua facility whom the Department recommended discharging at about the same time as Ward. In his opinion, the ALJ found that he had no jurisdiction to hear the claims, but that if he could have heard them, he "would conclude that the General Counsel has established by a preponderance of the evidence that the proposed discharges of Ward and Bellomo were motivated by their protected activity" and that even if some disciplinary action were warranted, discharge would not have been proposed in the absence of their union activities.

The 26 page opinion also documented action taken against other Canandaigua employees for allegations of patient abuse, which revealed that no such employee had ever been discharged. The VA responded that the Secretary would consider the ALJ's findings. But the Secretary sustained the Chief Medical Director's

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decision and ordered plaintiffs termination of employment. Several months later in April 1991 Ward brought suit in the United States District Court for the District of Columbia against the VA, the Secretary of Veterans Affairs, and the Director of the Veterans Administration Medical Center (defendants or appellants). He sought review of the Secretary's decision under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (1988), and claimed violations of his First and Fifth Amendment rights. Ward asked the district court for a reversal of the Secretary's decision, reinstatement, back pay, the cleansing of his record, costs and attorney fees. The parties filed cross motions for summary judgment. The district court- believing a trial necessary on the First Amendment claims, which would require substantial testimony from witnesses located in New York-transferred the case to the Western District of New York, where both parties renewed their motions for summary judgment.

The District Court for the Western District (Larimer, J.) granted in part and denied in part the parties' motions. It first found jurisdiction to hear the appeal

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because although decisions of the Secretary are "final" under 38 U.S.C. § 7462, the Secretary did not persuade the district court by clear and convincing evidence that Congress intended to preclude judicial review of his decisions. Second, the district court held that the Secretary's ruling that Ward's conduct with respect to one of the charged incidents constituted patient abuse was not arbitrary and capricious. But third, the trial court ruled that to impose a penalty of discharge was arbitrary and capricious in light of the policy in the VA *Personnel Policy Manual (VA Manual).* That policy requires the Department to treat similar offenses with similar penalties and to penalize employees in proportion to the offense committed.

In its third ruling, the district court placed great weight on examples it found in the ALJ's opinion of much more egregious conduct by other Department employees that did not result in their discharge. The district court therefore remanded the case to the Secretary to redetermine the appropriate penalty. It did not reach Ward's constitutional*519 claims or his request for back pay, but retained jurisdiction over the case.

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DISCUSSION

As a threshold matter, appellants insist the district court had no jurisdiction over Ward's suit and that its order must therefore be vacated. Were the case properly in the district court, they maintain as a second point, the discharge penalty imposed by the Secretary was not arbitrary and capricious. In concluding that the Secretary's decision was arbitrary, appellants continue, the trial court wrongly considered materials that had not been considered in the first instance by the Board, and restricted its review of Department penalties imposed only to those employees working at the Canandaigua facility. Appellants assert, as a third issue, that it was error for the court to decide the penalty was excessive, instead of leaving that decision to the Secretary or to the Board on remand. In the discussion that follows, we deal with each of these issues.

I Jurisdiction

[1] Defendants for the first time on appeal declare that Ward's suit was not properly before the district

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court because he sought monetary relief from the United States in excess of $10,000, and under the Tucker Act, 28 U.S.C. §§ 1346, 1491 (1988 & Supp. IV 1992), his claims for relief belong within the exclusive jurisdiction of the Court of Federal Claims. The VA defendants are entitled to raise this issue for the first time on appeal because it has been the rule since nearly the inception of our republic that subject matter jurisdiction may be raised any time. *See* *Mansfield, Coldwater & Lake Mich. R.R. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884) (citing *Capron v. VanNoorden*, 6 U.S. (2 Cranch) 126, 2 L.Ed. 229 (1804) as the genesis of the rule). While we agree that the Court of Federal Claims would have had jurisdiction over Ward's suit had he chosen to bring it in that forum, we are unable to adopt defendants' view that the Tucker Act divests a federal district court of its original jurisdiction over claims against the government for more than $10,000 when the claim is based on a statute, other than the Tucker Act, containing a waiver of sovereign immunity. The Tucker Act grants jurisdiction to the United States Court of Federal Claims to decide claims against the

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United States founded either upon the Constitution, a federal statute, or any regulation of an executive department. *See* 28 U.S.C. §1491(a)(1). Since Ward's suit is against an agency of the United States and is founded on a federal statute, namely the statute governing discipline of Department senior employees, 38 U.S.C. §§ 7461-7464, his action was subject to the jurisdiction of the Court of Federal Claims.

Nonetheless, the Tucker Act also provides that when the amount in controversy in a suit against the United States does not exceed $10,000, the federal district courts have original jurisdiction concurrent with the Court of Federal Claims. The Act states: "The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: ... [a]ny ... civil action or claim against the United States, not exceeding $10,000 in amount...." 28 U.S.C. a 1346 (1988 & Supp. IV 1992). Defendants read this section as giving an exclusive grant of jurisdiction to the Court of Federal Claims in cases involving more than $10,000. We rejected such a limited construction of the Tucker Act in *C.H. Sanders Co. V. BHAP Housing*

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Development Fund Co., 903 F.2d 114 (2d Cir. 1990).

In addressing the scope of the Tucker Act in *C.H. Sanders*, we held that regardless of the amount in controversy, an action in a district court is proper under the federal question jurisdiction statute, 28 U.S.C. § 1331, if a statute other than the Tucker Act provides the necessary waiver of sovereign immunity. *See C.H. Sanders*, 903 F.2d at 119. Thus, although an action could have been brought in the Court of Federal Claims under the Tucker Act, a district court has jurisdiction over the case so long as there is both a grant of subject matter jurisdiction *and* an independent waiver of sovereign immunity exists. *See Jackson Square Assocs. v. United States Dep't of Hous. & Urban Dev.*, 797 F.Supp. 242.244 (W.D.N.Y. 1992); *see also* *520 *Falls Riverway Realty, Inc. v. City of Niagara Falls*, 754 F.2d 49, 54 (2d Cir. 1985).

Here the district court concluded it had subject matter jurisdiction under the APA, 5 U.S.C. §§ 701-706, to review the Secretary's final decision made pursuant to 38 U.S.C. § 7462. Appellants have not appealed this ruling; but it remains their position that no statute

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other than the Tucker Act provides a waiver of sovereign immunity as to all of Ward's claims.

A. The Administrative Procedure Act

[2] The APA entitles "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute... to judicial review thereof." 5 U.S.C. §

702. In 1976 Congress amended the APA to add the following language:

An action in a court of the United States seeking relief *other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

Id. (emphasis supplied). The Supreme Court has interpreted this legislative language as providing a valid waiver of sovereign immunity in cases covered by the

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amendment to the APA. *See* Bowen v. Massachusetts, 487 U.S. 879, 891-92, 108 S.Ct. 2722, 2730-31, 101 L.Ed.2d 749 (1988). Hence, to the extent that Ward sought relief other than money damages-declaratory and injunctive relief-his claims were properly before the district court. *See id.* at 893, 108 S.Ct. at 2731. But the APA does not waive sovereign immunity for money damages claims. Back pay, as a claim for money damages, falls outside the scope of the APA. *See* Hubbard v. Administrator, EPA, 982 F.2d 531, 533 (D.C.Cir.1992) (en banc). Insofar as Ward's claim sought back pay, therefore, it was not properly before the district court unless Congress waived sovereign immunity for such claim in another statute.

B. The Back Pay Act

[3] Ward contends that such a waiver of sovereign immunity for back pay claims against the United States is found in the Back Pay Act of 1966, 5 U.S.C. § 5596 (1988). That Act provides a federal government employee is entitled to back pay if "found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected

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by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee." *See id. § 5596(b)(1)*. The Supreme Court reads the Back Pay Act as a statute that mandates compensation by the federal government in a successful suit against the government. *See Bowen*, 487 U.S. at 905 n. 42, 108 S.Ct. at 2738 n.42. "The Back Pay Act is the means by which appointed employees subjected to unjustified personnel action are given a cause of action against the United States." *United States v. Hopkins*, 427 U.S. 123, 128, 96 S.Ct. 2508, 2511, 49 L.Ed.2d 361 (1976). Such a cause of action is limited by the terms of the Back Pay Act to employees who have been unlawfully "subjected to a reduction in their duly appointed emoluments or position." *United States v. Testan*, 424 U.S. 392, 407, 96 S.Ct. 948, 957, 47 L.Ed.2d 114 (1976).

We read these binding cases an interpreting the Back Pay Act to provide an explicit waiver of sovereign immunity in cases covered by that Act. *Accord Brown v. Secretary of Army*, 918 F.2d 214, 216 (D.C.Cir.1990) (Back Pay Act waives sovereign immunity against

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prejudgement interest on Title VII back pay awards). *But see* Mitchell v. United States, 930 F.2d 893, 896 n. 3. 897 (Fed.Cir.1991) (Service member's suit for back pay falls within claims court's Tucker Act jurisdiction and does not lie in district court).

We think Ward's claim for back pay falls within the terms of the Back Pay Act. He has alleged that a federal government agency, the VA, has subjected him to a personnel action that has resulted in the withdrawal of his pay. If the agency action is determined to have been unwarranted, then Ward will be entitled to back pay and the Back Pay Act ***521** provides him the necessary consent to enforce this right in federal district court.

II Merits

[4][5] Having resolved the jurisdictional issue, we pass to the merits. Appellants challenge several aspects of the district court's decision. Before discussing them, we look for a moment at the scope of our review. On appeal from a district court's review of an APA claim, an appellate court accords no deference to the lower court's decision, *see* Hanson v. Espy, 8 F.3d 469, 472

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(7th Cir.1993); *Sierra Club v. Davies*, 955 F.2d 1188, 1192 (8th Cir. 1992), but instead conducts *de novo* review of the administrative record and renders its own independent judgment. The APA permits us to set aside the agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A). Although narrow, appellate review of an administrative record must nonetheless be careful, thorough and probing. *See Blassingame v. Secretary of Navy*, 866 F.2d 556, 559 (2d Cir. 1989).

A. The Penalty

[6] Analysis of the merits begins with the penalty of discharge recommended by the Board and adopted on appeal by the Secretary. At the time of the disciplinary proceeding against Ward, the Board was required by statute to recommend a penalty within the limitations prescribed by the Secretary. These penalties range from the lightest, a reprimand, move up to suspension and reduction of pay, and go to the heaviest penalty, discharge from employment. *See* 38 U.S.C. § 4110(d). The regulations prescribed by the Secretary are found in the *VA Manual* and its Department of Medicine and Surgery Supplements.

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The *VA Manual* governs disciplinary action taken against certain full-time Department employees, including registered nurses like Ward. *See VA Manual,* MP-5, Pt. II, ch. 8, sec. C-1. It mandates that once the Board has sustained a charge against an employee, it must recommend a penalty appropriate to the offense, and that in all cases where a penalty is recommended, "the principle of like penalties for like offenses will apply." *Id.* sec. C-5(a). Discharge is a penalty that may be appropriately imposed in cases of patient abuse. *See id.* Department Supp., fig. 8A.01. Yet, there is no evidence in the administrative record before us that the Board considered-much less applied-the policy of like penalties for like offenses.

With regard to the penalty chosen, the Board considered the so-called Douglas Factors, enumerated by the Merit Systems Protection Board as "relevant for consideration in determining the appropriateness of a penalty." *Curtis* Douglas, 5 M.S.P.B. 313, 5 M.S.P.R. 280, 304-06 (1981). The Board's decision merely states, The Disciplinary Board considered several issues as cited in the Douglas Factors ... in reaching its recommendation as to what administrative action is

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indicated. Specifically, the Disciplinary Board determined that the Douglas Factors # 1, # 2, # 7, and #11, were applicable to this case. The Disciplinary Board recommends that William Ward, R.N. be discharged from the Department of Veterans Affairs.

The Board did not find Douglas Factor # 6-"consistency of the penalty with those imposed upon other employees for the same or similar offenses"-to be applicable. *Id.* at 305. More importantly, the Board when selecting the penalty failed to refer to the *VA Manual* instructions given it, including the like penalties for like offenses policy. It was arbitrary and capricious for the Board not to consider the Secretary's regulations, as prescribed under 38 U.S.C. § 4110(d), when arriving at a penalty to mete out to a Department employee.

On appeal from the Board's decision, the Secretary had authority to reject or modify the penalty recommended by the Board. *See id.* In Ward's letter of appeal he averred that the Board's proposed penalty was inconsistent with the penalties imposed on other Department employees against whom a charge of patient abuse had been sustained, referring to the ALJ's

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opinion, which was before the Secretary. Although Ward's letter did not specifically cite the *VA Manual*, its discussion of disparate application of penalties was sufficient to alert the Secretary to *522 the Board's error. Further, plaintiffs neglect in citing the *VA Manual* is quite understandable in view of the Board's failure to provide him with a copy of its regulations. Had the Secretary considered the issue, it could have rendered harmless the Board's failure to address the policy of like penalties for like offenses in deciding on the disciplinary action to be taken against Ward.

After careful review of the administrative record, we see nothing to suggest the Secretary addressed the Board's error. The Option Paper prepared and submitted to the Secretary by his legal staff characterized Ward's claim only as a challenge to the Board's application of the Douglas factors, concluding that the Board was not required to consider the Douglas factors, and that in any event mitigation of the proposed penalty was not warranted. There is no reference in the Option Paper to the VA policies, found in Pt. II, ch. 8, sec. C of the *VA Manual*, concerning disciplinary actions against full-time Department nurses. Instead, the Option Paper

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only refers to a Department Supplement to Part I of the *VA Manual,* the scope of which explicitly *excludes nurses* covered by the provisions of Part II. *See VA Manual,* MP-5, Pt. I, ch. 752, Change 2, ¶ 1(a) (Sept. 16, 1974). Further, the Secretary's letter to Ward in response to Ward's letter of appeal simply points out that the Secretary was sustaining the Chief Medical Director's decision, who in turn had adopted the findings and recommendation of the Board.

In our view the Secretary's acceptance of the proposed penalty of discharge was arbitrary and capricious because at no time during the administrative process was the Secretary's own policy of like penalties for like offenses, promulgated under authority of 38 U.S.C. § 7462(d), ever addressed. Government agencies must take great care to follow their own rules and regulations. *See Blassingame, 866* F.2d at 560. Here, the agency's failure to follow or consider the regulations promulgated by the Secretary under § 7462 violated the APA. We therefore agree with the district court's conclusion, although for slightly different reasons, that the Secretary's decision regarding the penalty must be vacated as arbitrary and capricious.

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[7] In reaching this result, we reject appellants' argument that the Secretary was not required to consider the penalties imposed upon other Department employees because evidence of such other disciplinary actions was not before the Board. The policy of like penalties for like offenses is one the Board was required to consider before recommending a penalty. *See* 38 U.S.C. § 4110(d); *VA Manual*, MP-5, Pt. II, ch. 8, sec. C-1. Since the Board failed to consider this policy when imposing in this case its heaviest penalty, it was incumbent on the Secretary to do so, in order to ensure that its decision-which is the final decision in such a proceeding-was made in accordance with VA rules and regulations. The Secretary may not justify his failure to provide Ward with meaningful review by relying on the fact that Ward did not bring to the Board's attention records that the Board itself had a duty to consider.

B. *The Remand*

[8] We turn finally to the remand issue. The Supreme Court has cautioned that when an agency has not considered all relevant factors in taking action, or has provided an insufficient explanation for its action, the

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appropriate course for a reviewing court ordinarily is to remand the case to the agency. *See* Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744,105 S.Ct. 1598, 1607, 84 L.Ed.2d 643 (1985). We therefore modify the district court's order to the extent that it undertook to determine whether Ward's discharge was consistent with the VA policy of like penalties for like offenses. On remand the Secretary shall himself determine whether discharging Ward would be consistent with the penalties imposed upon other Department employees, or the Secretary may send the case back to the Board for a determination of this issue. The Secretary shall also determine whether the policy of like penalties for like offenses is meant to be applied on a facility-by-facility basis, or on a system-wide basis. It may well be that depriving Ward of his employment was motivated by extraneous factors, a matter the ***523** administrative decision-maker should determine. In either case, the burden is on the agency to show that the action taken is in compliance with the statutes and regulations applicable to the VA. *See* Blassingame, 866 F.2d at 560; Camp v. Pitts, 411 U.S. 138,143, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973) (*per curiam*). We do nothing to interfere with the district court's retention of this case

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after the administrative process has run its course.

CONCLUSION

The district court's order vacating the Secretary's decision with respect to the penalty imposed is affirmed, and the case is remanded to the Secretary for further proceedings consistent with this opinion.

C.A.2 (N.Y.),1994.
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APPENDIX 6

VA HANDBOOK 5021 APRIL 15, 2002
PART III
CHAPTER 1

NOTE: *For dentists and expanded-function dental auxiliaries, reviews will be conducted by the PSBs listed in VA Handbook 5005.*

NOTE: *If a facility director believes a local PSB meeting the requirements of this chapter cannot be properly constituted, the appropriate VISN board will be asked to complete the probationary review. If there are no VISN boards for the occupation, another facility director may be asked to establish a PSB for this purpose.*

NOTE: *For podiatrists and optometrists, the appropriate service chief is the authorizing official; however, the review will he conducted by the VA Central Office Professional Standards Board*

f. **Professional Standards Boards.** Professional Standards Boards will review the work records of each employee serving a probationary period in accordance with the provisions of this chapter. The establishment, membership and composition of Professional Standards

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Boards, as prescribed in VA Handbook 5005, part II, chapter 3, will be applicable to probationary reviews. Members from facilities other than the employee's may he designated to serve on the Board when it is determined to be appropriate or necessary.

g. **Supervisors.** Supervisors will continually review the services of employees serving in a probationary status. Supervisors must assure by active measures that the work records of unsatisfactory employees or of those whose services are merely borderline are promptly referred to appropriate officials for action.

h. **Chief, Human Resources Management, or Designee.** The Chief, Human Resources Management, Management, or designee, is responsible for:

(1) Assisting management officials with probationary procedures.

(2) Reviewing proposed probationary actions for conformance with Department and VHA policies arid procedures.

(3) Advising employees about probationary procedures and rights.

(4) Serving as technical advisor to Boards. This

includes advising Board members on policies and procedures related to conducting probationary reviews.

(5) Ensuring that copies of permanent records relating to periodic and summary reviews are included in the Health Care Provider Credentialing and Privileging Records of personnel with clinical privileges.

3. SUMMARY BOARD REVIEWS

a. **Purpose.** Summary reviews are limited to situations where summary separation from Federal service may be justified. Officials identified in paragraph 2a-2e above are responsible for deciding whether to conduct a summary review of an employee's services. Supervisors may initiate requests for summary reviews at any time during the probationary period.

b. **Length of Probationary Period**. The probationary period for employees appointed on or after December 20, 1979, is 2 years. Employees who have not previously completed a probationary period, but have creditable service before December 20, 1979, must complete the 3-year probationary period which was in effect when they were originally appointed under 38 U.S.C. 4104(1). For example, a physician who was originally given a full-time appointment on February 1, 1977, was converted to a part-time appointment on February 1, 1979, and back to a full-time appointment under 38 U.S.C. 7401(1) on February 1, 1993. Although credit is given for the 2 years of probationary service gained before February 1, 1979, the physician must complete the 3 -year probationary period by serving in a probationary appointment through January 31, 1994. Employees with no creditable probationary service before December 20, 1979, are only required to serve a 2-year probationary period.

c. **Last Day of Probationary Period**

(1) For employees paid on a daily basis (physicians,

dentists, podiatrists, [ ] optometrists [, and chiropractors]), the probationary period ends at midnight on the last calendar day before the employee's anniversary date, whether or not the employee is in a duty status that day. For example, a probationary period beginning November 1, 1997, ends at midnight October 31, 1999.

(2) For employees paid on and hourly basis (nurses, nurse anesthetists, PAs (physician assistants), and EFDAs (expanded-function dental auxiliaries)[)], the probationary period is completed at the end of the last scheduled duty before the employee's anniversary date. (For the purposes of this paragraph, scheduled duty includes normal and overtime duty, leave, excused absence, including holidays, and absence without leave.) For example, a probationary period beginning November 1, 1997, is completed as follows:

(a) For an employee whose last duty occurs at 4:30 p.m. on October 31, 1999, the probationary period is completed at 4:30 p.m, October 31, 1999.

(b) For an employee whose last hour of duty is from 11:00 p.m., October 31, 1999, to 7:00 a.m., November 1, 1999, the probationary period is completed at midnight October 31,1999.

(c) For an employee whose last duty (because of days off) is 4:30 p.m., October 29, 1999, the probationary period is completed at 4:30 p.m., October 29, 1999.

(d) If completed satisfactorily, the employee will automatically attain status as a permanent employee.

d. **Creditable Service**. The following service is creditable toward completion of the probationary period:

(1) Continuous service in an appointment under 38 U.S.C. 7401(1) or 7306.

(2) Leave with pay during creditable service.

(3) Leave without pay during creditable service not exceeding a total of 40 calendar days for physicians, dentists, podiatrists [,] optometrists [, or chiropractors,] or 235 hours for nurses, nurse anesthetists, PAs, and EFDAs during creditable service. **NOTE**: *When determining this total, each hour of leave without pay taken by a nurse or nurse anesthetist on the Baylor Plan is to be multiplied by 1.667.*

(4) Prior satisfactory probationary service of at least 6 months duration followed by break(s) in service totaling 1 year or less if the break was not due to separation for cause. A break in service is defined for the purpose of this subparagraph as a period during which no service is rendered under 38 U.S.C. 7306, 7401(1), or 7405(a).

(5) Time before restoration during which a probationary employee received work injury compensation from the Office of Workers' Compensation Programs.

(6) Time spent in a probationary period served under 38 U.S.C. 7403(b) prior to holding some other

type of appointment in VHA if the employee is subsequently appointed under 38 U.S.C. 7401(1), provided the conditions of subparagraph d above are met.

e. **Requirement For Serving New Probationary Period.** Employees who satisfactorily completed the probationary period required by 38 U.S.C. 7403(b) will not serve a new probationary period upon reappointment unless their separation was for cause.

f. **Periodic Reviews**

(1) **Informal Reviews**

(a) Supervisors will review the services of employees on a continuing basis through observation and evaluation of their performance and conduct during the probationary period. They must remain aware of this responsibility, both when judging employee performance and when acclimating employees to their work environment. The acclimation will include careful explanations of the duties and responsibilities of the position, opportunities for development, and applicable employment and conduct regulations and procedures.

(b) When the employee has had an opportunity to learn what is expected, the supervisor should give

consideration to any inadequacies in performance or conduct. The employee's weak points should be discussed objectively and suggestions made for improvement. If the employee's performance is considered good or outstanding in some aspect, this fact should be made known to the employee. If the employee's adjustment and performance are not satisfactory, the employee's immediate or higher supervisor will submit a written request for formal or summary review though channels to the official authorized to approve further review of the employee's services. This request will describe the employee's deficiencies, and the supervisor's efforts, such as training, modification of assignments, use of preceptors, etc., to assist the employee. The request may be initiated any time during the probationary period, and may be made notwithstanding past or pending proficiency ratings or the results of any previous probationary review. If the immediate supervisor is the authorizing official, the same information is to be forwarded in writing to the Chairperson of the appropriate Professional Standards Board for consideration as a part of the summary review.

f. **Transfer**. The involuntary movement of an employee from one VA facility to another (under separate managerial authority) based on conduct or performance and without a break in service.

g. **Reduction in Grade**. The involuntary assignment to a lower grade on the same pay schedule based on conduct or performance.

h. **Reduction in Basic Pay**. The involuntary reduction, based on conduct or performance, of the annual rate of basic pay to which an employee is entitled under 38 U.S.C. 7404, including above minimum entrance rates and special salary rates authorized under 38 U.S.C. 7455. This does not apply to reductions in pay other than basic pay, such as the loss of physician or dentist special pay or head nurse differential, other differentials, allowances or premium pay such as standby, on-call, shift, overtime, Sunday, holiday, night work, hazardous duty, and interim geographic adjustment.

i. **Discharge**. The involuntary separation of an employee from employment based on conduct or performance.

j. **Disciplinary Appeals Board**. The three member board designated to hear an employee's appeal of a major adverse action which is based in whole or in part on a question of professional conduct or competence.

k. **Professional Conduct or Competence.** A question of professional conduct or competence involves direct patient care and/or clinical competence. The term clinical competence includes issues of professional judgment.

l. **Mixed Case.** This is a case that includes both (1) a major adverse action arising out of (or including) a question of professional conduct or competence, and (2) a major adverse action which does not arise out of a question of professional conduct or competence, or a disciplinary action,

m. **Grade.** The established grades for the positions covered by this chapter will be as defined by 38 U.S.C. 7404, and the qualification standards issued pursuant to 38 U.S.C. 7402. (See part II of VA Handbook 5005, Staffing.) (Authority: 38 U.S.C. 501(a), 7421.)

4. **RESPONSIBILITIES AND AUTHORITIES.** The Under Secretary for Health or designee will appoint Disciplinary Appeals Boards to hear appeals of major adverse actions and will review and take appropriate

action on all decisions rendered by Disciplinary Appeals Boards.

(Authority: 38 U.S.C. 501(a).)

5. **DISCIPLINARY ACTIONS**

a. **Types of Disciplinary Actions.** This paragraph applies to adverse actions, other than major adverse actions, which include admonishment and reprimand based on conduct or performance (refer to paragraph 3 of this section for definitions).

b. **Procedural Entitlements**

(1) Prior to taking disciplinary action, employees must be given:

(a) Advance written notice of the action proposed. The advance notice of proposed action must contain the following information:

1. The nature of the action proposed (e.g., admonishment);

2. A statement of the specific charges upon which the proposed action is based, including names, dates, places, and other data sufficient to enable the employee to fully understand the charges and to respond to them;

3. A statement of any specific law, regulation, policy, procedure, practice or other specific instruction (national, local or otherwise) that has been violated as it pertains to the charge(s), if applicable;

(b) The right to reply orally or in writing, or both orally and in writing, and to submit affidavits and other documentary evidence in support of the reply;

(c) The right to a reasonable amount of time to submit the reply or replies (time limits may vary

according to the circumstances but in no event should be less than five calendar days);

(d) The right to review the material relied upon to support the reasons for the proposed action;

(e) Identification of the official who will receive any oral and/or written replies;

(2) The right to a written decision as soon as possible after the employee's reply has been fully considered or after the expiration of the time allowed for reply, if the employee does not reply;

(3) The right to be represented by an attorney or other representative of the employee's choice at all stages of the case; and

(4) The right to grieve the disciplinary action, if any.

c. **Employee's Reply**

(1) If the employee requests an opportunity to reply orally, the decision official or designee will receive the employee's reply. Any official designated to receive the reply must have the authority to recommend what final decision should be made.

(2) A written summary signed by the official hearing the oral reply must be made part of the record.

d. **Arriving at a Final Decision**

(1) The decision official will give full and impartial consideration to the employee's reply, if any; the recommendation of the designee hearing an oral reply, if any oral reply was made; and all evidence of record. If the decision official finds one or more of the charges in the advance notice sustained, he or she will determine an appropriate action.

(2) A decision adverse to the employee must be based only on the charges stated in the notice of proposed action. If none of the charges are sustained, either in whole or in part, no action may be imposed, regardless of any record of past discipline cited in the notice.

(3) The penalty may not be more severe than that proposed in the notice of proposed action.

(4) If the notice of proposed action is determined to be procedurally defective to the detriment of the employee's substantive rights, or if it is found that additional reasons other than those set forth should he considered, or that the appropriate action should be more severe than that proposed, the notice of proposed action will be rescinded and a new notice of proposed action issued.

(5) If it is determined that the appropriate action is a major adverse action, the procedures outlined in paragraph 6 of this section will apply.

e. **Decision.** The decision will be in writing and will contain the following information:

(1) A statement of whether any of the charges sustained arose out of a question of professional conduct or competence.

(2) A statement that consideration has been given to all evidence developed, including the employee's reply(ies).

(3)A statement of the decision official's determination regarding which charges, if any, in the advance notice were sustained, and which charges, if any, were not sustained.

(4) If a record of prior disciplinary actions was cited in the advance notice, the decision will indicate how the past record, as cited in the advance notice, was taken into consideration in determining the proper action. (Prior disciplinary actions which have expired or have been withdrawn may not be cited as a basis for a future action.)

(5) A statement concerning the employee's rights to file a grievance, and the time limit within which it must be filed.

f. **Appeals of Disciplinary Actions**

(1) If the disciplinary action involves or includes a question of professional conduct or competence, the employee may appeal it under the grievance procedures contained in section B of this appendix.

(2) If the disciplinary action does not involve or include a question of professional conduct or competence, the employee may appeal the action under the grievance procedure in section B of this appendix. However, if the employee is covered by a collective bargaining agreement under 5 U.S.C., chapter 71, and the negotiated grievance procedure includes disputes over these actions within its scope, the employee may elect to appeal the action through the negotiated grievance procedure or the grievance procedure in section B of this appendix, but not both. The employee shall elect which grievance procedure will be used. The timely filing of a grievance under either procedure shall constitute an irrevocable election. Grievances filed under the negotiated grievance procedure must be filed in

accordance with the provisions of the applicable negotiated grievance procedure. Reference should be made to the negotiated agreement for the appropriate steps and time limits.

g. **Withdrawal of Action**

(1) After 2 years, admonishments will be removed from the personnel folder and destroyed. However, in cases of patient abuse, an admonishment may be retained in the personnel folder indefinitely. The employee's supervisor may, after 6 months, make a written request to the Human Resources Management (HRM) Officer that the admonishment, including patient abuse cases, be withdrawn, if the employee's conduct so warrants.

(2) After 3 years, a reprimand will he removed from the personnel folder and destroyed. However, in cases of patient abuse, the reprimand may be retained in the personnel folder indefinitely. The employee's supervisor may, after 2 years, make a written request to the HRM Officer that the reprimand, including patient abuse cases, be withdrawn, if the employee's conduct so warrants.

(3) If the request for early withdrawal is initiated by a supervisor below the level of the official who issued the action, it must be approved at or above the level of the initial decision official.

(4) The employee may, after 6 months, make a written request to the supervisor that the admonishment be withdrawn. The employee may, after 2 years, make a written request to the supervisor that the reprimand be withdrawn.

(5) Since the admonishment or reprimand may be appealed under the grievance procedure initially and, except inpatient abuse cases, will automatically be removed from the personnel folder after 2 or 3 years, respectively, a grievance may not be filed based on a supervisor's decision not to remove it earlier than the expiration date.

(Authority: 38 U.S.C. 501(a), 7421, 7461, 7463.)

6. MAJOR ADVERSE ACTIONS

a. **Types of Actions.** This paragraph applies to suspensions, transfers, reductions in grade, reductions in basic pay, and discharges.

b. **Burden of Proof.** When taking a major adverse action against an employee, the Department bears the

burden of proving by a preponderance of evidence the charges that form the basis for the action.

c. **Procedural Entitlements**

(1) Prior to taking a major adverse action, the employee must be given:

(a) 30 calendar days advance written notice of the action proposed. The advance notice of proposed action must contain the following information:

1. The nature of the action proposed;

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CHAPTER 4. PROBATIONARY PERIOD

4.01 GENERAL

a. Scope. This chapter implements Department of Veterans Affairs (VA) Manual MP-5, part II. chapter 4 for employees serving a probationary period under 38 United States Code (U.S.C.) 7403(b). This means that employees appointed under 38 U.S.C. 7401(1), i.e., physicians, dentists, podiatrists, optometrists, nurses, nurse anesthetists, physician assistants, and expanded function dental auxiliaries. Unless otherwise indicated, any reference to employee or employees refers to all the preceding. The Under Secretary for Health's designee refers to a designee in VA Central Office.

b. Exclusions. This chapter does not apply to employees appointed under 38 U.S.C. 7306 or 38 U.S.C. 7405. It also does not apply to personnel listed under 38 U.S.C. 7401(3).

4.02 REFERENCES

Necessary legal, regulatory, and related policy references are contained in the applicable paragraph. In

addition, citations of a particular section or sections of statutory law or other legal authority upon which the policy is based are contained at the end of each substantive paragraph.

4.03 POLICY

a. Extension of Appointment Process. The probationary period is an extension of the appointment process. It provides the final test of the appointee's qualifications, i.e., actual performance on the job. During the probationary period, the employee's conduct and behavior will be closely observed. The employee may be separated from the service if not found fully qualified and satisfactory. Thus, the probationary period provides a safeguard against retention of any person who, in spite of having met legal and regulatory requirements for appointment, is found in actual practice to be unsuited for permanent employment in Veterans Health Administration (VHA).

b. Recruitment, Retention and Enhancement of Performance. The probationary period also affords an opportunity for fostering the interest of the employee in a VA career. Thoughtful and considerate treatment during the probationary period will have a lasting effect on the employee's career. It will enhance employee performance and often ensure useful and efficient

service by employees who might otherwise resign, be separated, or be retained in assignments in which they have little prospect of success.

c. Management Support. The probationary period cannot serve as a full and fair trial period without the full cooperation of supervisors and managers at all levels. New employees, particularly those with no prior Federal service, should not be expected to immediately render

services which would normally be required of experienced and trained employees During the initial period of employment, a sincere effort must be made by supervisors and human resources management officials to orient employees into the new work situation and to provide essential training and instruction.

Authority: 38 U.S.C. 7403(b); 38 U.S.C. 7304.

4.04 RESPONSIBILITIES

a. Authorizing Officials. The appropriate officials listed in Appendix 4A may authorize Board reviews on their own initiative or on the recommendation of other appropriate officials. Throughout this chapter, the term authorizing official refers to those listed in that appendix.

b. Review Boards

(1) Professional Standards Boards will review the work records of each employee serving a probationary period in accordance with the provisions of this chapter.

(2) The establishment, membership and composition

of Professional Standards Boards, as prescribed in MP-5, Part II, Chapter 2, Paragraph 5, and Paragraph 2.20 of the VHA Supplement thereto, will be applicable to probationary reviews. Members from facilities other than the employee's may be designated to serve on the Board when it is determined appropriate or necessary. Supervisors. Supervisors will continually review the services of employees serving in a probationary status. Supervisors must assure by active measures that the work records of unsatisfactory employees or of those whose services are merely borderline are promptly referred to appropriate officials for action.

d. Chief, Human Resources Management, or Designee. The Chief, Human Resources Management, or designee, is responsible for:

(1) Assisting management officials with probationary procedures.

(2) Reviewing proposed probationary actions for conformance with Department and VHA policies and procedures.

(3) Advising employees about probationary procedures and rights.

(4) Serving as technical advisor to Boards. This

includes advising Board members on policies and procedures related to conducting probationary reviews.

(5) Ensuring that copies of permanent records (see Para. 4.08b(4) and 4.09i(2)) relating to periodic and summary reviews are included in the Health Care Provider Credentialing and Privileging Records (77VA11) of personnel with clinical privileges.

Authority: 38 U.S.C. 7403(b); 7304.

4.05 LENGTH OF PROBATIONARY PERIOD

a. Length. The probationary period for employees appointed on or after December 20, 1979, is 2 years. Employees who have not previously completed a probationary period, but have creditable service before December 20, 1979, must complete the 3-year probationary period which was in effect when they were originally appointed under 38 U.S.C. 4104(1). For example, a physician who was originally given a full-time appointment on February 1, 1977, was converted to a part-time appointment on February 1, 1979, and back to a full-time appointment under 38 U.S.C.7401(1) on February 1, 1993. Although credit is given for the 2 years of probationary service gained before February 1, 1979, the physician must complete the 3-year probationary period by serving in a probationary appointment through January 31, 1994. Employees with no creditable probationary service before December 20, 1979, are only required to serve a 2-year probationary period.

b. Last Day of Probationary Period

(1) For employees paid on a daily basis

(physicians, dentists, podiatrists, and optometrists), the probationary period ends at midnight on the last calendar day before the employee's anniversary date, whether or not the employee is in a duty status that day. For example, a probationary period beginning November 1, 1992, ends at midnight October 31, 1994.

(2) For employees paid on an hourly basis (nurses, nurse anesthetists, PAs(physician assistants), and EFDAs (expanded-function dental auxiliaries), the probationary period is completed at the end of the last scheduled duty before the employee's anniversary date. (For the purposes of this paragraph, scheduled duty includes normal and overtime duty, leave, excused absence, including holidays, and absence without leave.) For example, a probationary period beginning November 1, 1992, is completed as follows:

(a) For an employee whose last duty occurs at 4:30 p.m. on October 31, 1994, the probationary period is completed at 4:30 p.m., October 31, 1994.

(b) For an employee whose last tour of duty is from 11:00 p.m., October 31, 1994, to 7:00 a.m., November 1, 1994, the probationary period is completed at midnight October 31,1994.

(c) For an employee whose last duty (because of

days off) is 4:30 p.m., October 29, 1994, the probationary period is completed at 4:30 p.m., October 29, 1994.

Authority: 38 U.S.C.7403(b); 7304.

4.06 CREDITABLE SERVICE

The following service is creditable toward completion of the probationary period:

a. Continuous service in an appointment under 38 U.S.C. 7401(1) or 7306.

b. Leave with pay during creditable service.

c. Leave without pay during creditable service not exceeding a total of 40 calendar days for physicians, dentists, podiatrists and optometrists or 235 hours for nurses, nurse anesthetists, PAs, and EFDAs during creditable service. NOTE: When determining this total, each hour of leave without pay taken by a nurse or nurse anesthetist on the Baylor Plan is to be multiplied by 1.667.

d. Prior satisfactory probationary service of at least 6 months duration followed by break(s) in service totaling 1 year or less if the break was not due to separation for cause. A break in service is defined for the purpose of this subparagraph as a period during which no service is rendered under 38 U.S.C. 7306, 7401(1), or 7405(a).

e. Time before restoration during which a probational employee received work injury compensation from the Office of Workers' Compensation Programs.

f. Time spent in a probationary period served under 38 U.S.C. 7403(b) prior to holding some other type of appointment in VHA if the employee is subsequently

appointed under 38 U.S.C. 7401(1), provided the conditions of subparagraph d above are met.

Authority: 38 U.S.C. 7403(b); 7304.

4.07 REQUIREMENT FOR SERVING NEW PROBATIONARY PERIOD

Employees who satisfactorily completed the probationary period required by 38 U.S.C. 7403(b) will not serve a new probationary period upon reappointment unless their separation was for cause.

Authority: 38 U.S.C. 7403(b); 7304.

4.08 PERIODIC REVIEWS

a. Informal Reviews

(1) Supervisors will review the services of employees on a continuing basis through observation and evaluation of their performance and conduct during the probationary period. They must remain aware of this responsibility, both when judging employee performance and when acclimating employees to their work environment. The acclimation will include careful explanations of the duties and responsibilities of the position, opportunities for development, and applicable employment and conduct

regulations and procedures.

(2) When the employee has had an opportunity to learn what is expected, the supervisor should give consideration to any inadequacies in performance or conduct. The employee's weak points should be discussed objectively and suggestion made for improvement. If the employee's performance is considered good or outstanding in some aspect, this fact should be made known to the employee. If the employee's adjustment and performance are not satisfactory, the employee's immediate or higher supervisor will submit a written request for formal or summary review though channels to the official authorized to approve further review of the employee's services. This request will describe the employee's deficiencies, and the supervisor's efforts, such as training, modification of assignments, use of preceptors, etc. to assist the employee. The request

may be initiated any time during the probationary period, and may be made notwithstanding past or pending proficiency ratings or the results of any previous probationary review. If the immediate supervisor is the authorizing official, the same information is to be forwarded in writing to the Chairperson of the appropriate Professional Standards Board for consideration as a part of the summary review.

b. Formal Reviews

(1) Appropriate supervisory officials and Standards Boards have responsibility for periodically reviewing the services of probationary employees. At a minimum, at least one formal-periodic review during the probationary period will be done (typically, following completion of the employee's first Proficiency Report).

(2) The Human Resources Management Office will remind the employee's immediate supervisor and the Chairperson of the Board listed in Appendix 4A of the review requirement.

(3) The employee's immediate supervisor will

initiate formal periodic review by submitting a recommendation through channels to the Board. The recommendation should be based on the employee's Proficiency Report and any related material. The Board will have access to the employee's Official Personnel Folder and the entire employment record including Proficiency Reports, any counseling reports, and supervisory evaluations. The Board will consider all aspects of the employees service.

(4) Board Recommendations:

(a) If the employee is judged fully qualified and satisfactory, the Chairperson of the Board will record that finding by endorsing the current Proficiency Report or by preparing a separate memorandum report, and the employee will be advised of the finding by the immediate supervisor.

(b) If the Board questions whether the employee is fully qualified and satisfactory, the Board is to return the ease to the appropriate authorizing official with a recommendation that a summary review of the employee's services be initiated.

Authority: 38 U.S.C. 7403(b); 7304.

4.09 SUMMARY BOARD REVIEWS

a. Purpose. Summary reviews are limited to situations where summary separation from the service may be justified. Officials identified in paragraph 4.04a are responsible for deciding whether to conduct a summary review of an employee's services. Supervisors may initiate requests for summary reviews at any time during the probationary period.

b. Review Boards. Summary reviews will be conducted by the Professional Standards Boards listed in appendix 4A. Persons in a position to prejudice the action of a Board, such as an employee' s immediate or second level supervisor, may not serve on the Board.

c. Special Proficiency Report. A special Proficiency Report may be initiated at any time. If an employee to be reviewed under this paragraph has not received a Proficiency Report within the three months prior to the summary review, a special Proficiency Report should be completed in accordance with VHA Supplement, MP-5, Part II, Chapter 6, paragraph 6.06.

d. Employee Rights. Employees subject to summary Board review have the right to:

(1) Advance written notice of the Board review as indicated in subparagraph e.

(2) Review documents relied upon by officials in initiating or recommending a summary Board review, subject to applicable disclosure restrictions.

(3) Impartial review by the Board.

(4) Reply orally and/or in writing to the Board concerning the reasons for the review.

(5) Be represented by an individual of the employee's choice, provided the choice would not create a conflict

of interest. A summary review is not an adversarial procedure. The representative's role is limited to assisting the employee in exercising the right to reply orally and/or in writing to the reasons for the review. Any responses to requests for information by the Board during the review process are considered part of the employee's reply. Accordingly, the employee's representative may assist in such matters. NOTE: Because summary reviews deal with issues related to professional competence or conduct and peer review, a union representative is not entitled to be present at a summary review except when serving as the employee's personal representative.

e. Notice to Employee of Board Review. Normally, the employee will be given 10 to 14 calendar days notice prior to a summary review. The notice will be in writing, prepared for the signature of the Chairperson of the Board and indicate: (A sample notice may be found in App. 4D.)

(1) The time, date, and place of the proposed review and a statement that this review is being conducted under authority of 38 U.S.C. 7403(b).

(2) The reasons for the review--briefly, but in sufficient detail for the employee to clearly understand why he or she may not be fully qualified and

satisfactory.

(3) That, in conducting the review, the Board will use available records and information furnished by the employee and others who may be called by the Board. The Board will issue findings and recommend, under the provisions of 38 U.S.C. 7403(b), the employee's retention or separation.

(4) The employee's rights in the review process, as indicated in subparagraph d.

(5) A date, normally no less than 3 workdays before the Board review date, by which the employee must submit any written reply and/or notify the Chairperson of the Board whether the employee will appear personally before the Board and whether the employee will be accompanied.

by a representative. The employee will be asked to furnish the name, address, and occupation of any representative.

(6) That the Chief, Human Resources Management, or designee, is available to advise the employee about probationary review policies and procedures.

(7) That the employee will be notified of the outcome of the review.

NOTE: Additional evidence that forms the basis for new reasons upon which to base the summary review acquired after the notice of summary review has been issued will not be considered in the summary review unless the notice of summary review has been reissued. The employee or employee's representative shall be provided with copies of any reissued notice of summary review.

(f) Conduct of Board Review. The primary purpose of the Board in conducting a summary review is to obtain the available facts and determine whether the employee is fully qualified and satisfactory. Interviews

with the employee, supervisors, or others should he conducted in an informal manner. Only Board members are entitled to be present when an individual is being interviewed, except that an employee's representative may bc present while the employee is being interviewed. Employees or others who may be called upon to furnish information will not be subject to cross-examination, and the Chairperson of the Board will ensure that this does not occur.

(1) Oaths or affirmations need not be required or administered in connection with the Board review.

(2) When the employee attends the review, the Chairperson will remind the employee of the reasons and the legal authority for the review, which were included in the notice to thc employee.

(3) All members of the Board will be present throughout the entire review.

(4) A verbatim recording of the review will not be made unless the Chairperson deems it necessary.

(5) The Chief, Human Resources Management, or designee, will serve as a technical adviser to the Board. The Chairperson may also obtain technical or legal assistance from other VA employees. Persons who will

advise or assist the Board cannot serve on the Board.

(6) To obtain essential facts, the Chairperson may call persons before the Board to answer questions that may assist the Board in its review. This includes persons who are believed to possess pertinent information about the employee or the circumstances which led to the review.

(7) Ordinarily, VA patients are not to be called upon for information or otherwise be involved in Board reviews. Patients, with their consent, may be witnesses when information from them is considered essential and there has been a medical determination that the patient has the capacity to testify and that appearance as a witness will not be detrimental to the patient's health or welfare.

(8) If an allegation of discrimination based on race, color, religion, sex, age, disability, or national origin is raised at any stage of a review by a Board, the employees will be informed that the matter may be brought to the attention of an Equal Employment Opportunity (EEO) counselor as authorized in MP-7, Part I, Chapter 3, par.1. After such notification, the probationary review will be completed. If the decision is to separate the probationer, the separation will not be delayed because of a discrimination complaint.

g. Findings and Recommendations of Board. Upon completion of the Board review, the Board will meet in closed session to discuss its findings and make its recommendations. The Board may recommend separation or retention of the employee. Findings and recommendations of the Board will be recorded on VA Form 10-2543, Board Action, as indicated in Appendix 4B.

h. Action on Board Recommendations

The administrative review and action on Board recommendations specified in this paragraph, and Appendix 4B, do not apply to VHA facilities in

Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. The recommendations of Summary Review Boards conducted at facilities in these States are approved by the Board. While notification to the employee of any decision of the Summary Review Board should be signed by an appropriate official, such notification should reflect that the decision was made by the Board.

(1) Employees Other Than Chiefs of Staff, Facility Directors, and VA Central Office employees

(a) The completed Board action and all related documents will be sent to the Chief of Staff for review. (This includes summary reviews completed by Regional Professional Standards Boards, and summary reviews conducted at other VA facilities, including VA Central Office.) The Chief of Staff will comment on the Board recommendations and send these comments, the Board Action, and related documents to the facility Director.

(b) The facility Director, or designee, may approve, disapprove, or modify the Board's recommendation on the Board Action. However, in making this decision, the facility Director may seek additional advice and information.

(c) The provisions of VA Directive 10-95-032, dated March 23, 1995, in essence, decentralized the appointment and employment processes of key personnel for whom control had previously been maintained at the Headquarters level. Since probationary periods and reviews are an extension of the appointment process, the provisions of this chapter relating to these formerly centralized staff are, therefore, also simultaneously delegated.

(2) Chiefs of Staff

(a) The Headquarters Board will forward the board action containing their recommendations, along with all related documents, to the VISN Director for a final decision.

(b) The VISN Director may approve, disapprove, or modify the Board's recommendation on the Board Action form. However, in making this decision, the VISN Director may seek additional advice and information.

(3) Facility Directors. The Board Action and all related documents will, be forwarded to the Under Secretary for Health for review. The Under Secretary for Health shall, in consultation with appropriate VHA officials, comment on the Board recommendation and send these comments, the Board Action, and related documents through the Deputy Assistant Secretary for Human Resources Management to the Secretary for action. The Secretary may accept, reject, or modify the recommendation.

(4) VA Central Office Employees. The Board Action and all related documents will be forwarded through channels to the Office of Human Resources

Management (051). The Office of Human Resources Management will forward the recommendation to the Under Secretary for Health who may approve, disapprove, or modify the recommendation.

i. Effecting Approved Recommendations

(1) Separation. Separations under these procedures must be effected before completion of the probationary period. (See par.4.05b.) The employee will normally be given 15 calendar days notice, but the notice period may be shortened if necessary to effect the separation before completion of the probationary period.

(2) Retention. The employee will be notified that his or her retention in VHA has been approved. All proficiency ratings and board actions relating to the summary review will be retained as permanent records in the Official Personnel Folder. A recommendation for retention does not preclude subsequent initiation of a summary review prior to completion of the probationary period.

j. Reporting Separated Licensed Appointees to State Licensing/Registration Boards or License Monitoring Entities. Approving officials are responsible for determining whether to report an individual who is separated as a result of the review, or resigns, or retires

prior to the completion of the review process, to appropriate licensing/registration boards or license monitoring entities. In making such determinations, approving officials are responsible for ensuring adherence to the required procedures and time standards for VA initiated reporting, prescribed in VHA Manual MP-2, Part I. Chapter 34.

k. Records. The board action and proficiency report are to be filed in the Official Personnel Folder whether or not the employee is separated or retained.

Authority: 38 U.S.C. 7403(b); 7304; Public Law 99-166, Section 204.

4.10 PENALTY ACTIONS

a. General. While the provisions of MP-5, Part II, Chapter 8, are not applicable to employees who have not completed the probationary period, in certain cases imposing a penalty action may be appropriate.

(1) These actions may be imposed during the probationary period to correct conduct deficiencies which are not serious enough to justify separation of an employee from the service.

(2) Penalty actions may be imposed as the result of a Professional Standards Board review of an employee's services or by supervisory officials independent of Board action if the employee's action(s) do not warrant peer review.

b. Types of Penalty Actions

(1) Admonishment. An admonishment is an official letter of censure given to an employee for a minor conduct deficiency or deficiencies. It may be given in a probationary period to correct an employee's behavior when the deficiency or deficiencies are not serious

enough to warrant separation. The letter will, to the extent possible, describe the deficiency or deficiencies as to time, place, and circumstances and contain information about withdrawal of the admonishment from the employee's Official. Personnel Folder. A sample letter of admonishment is contained in Appendix 4E.

(2) Reprimand. A reprimand is an official letter of censure given to an employee for a conduct deficiency or deficiencies. It may be given in a probationary period to correct an employee's behavior when the deficiency or deficiencies are not serious enough to warrant separation. The letter will, to the extent possible, describe the deficiency or deficiencies as to time, place, and circumstances and contain information about withdrawal of the reprimand from the employee's Official Personnel Folder. A sample letter of reprimand is contained in Appendix 4F.

c. Approvals

(1) The facility Director may designate supervisory officials at or above the service chief level to approve actions under this paragraph for probationary employees.

(3) The appropriate VISN Director approves

admonishments and reprimands for Chiefs of Staff and facility Directors in their probationary period.

Appropriate officials at or above the service director level may approve admonishments and reprimands for VA Central Office employees in their probationary period.

Authority: 38 U.S.C. 7403(b); 7304.

4.11 EMPLOYEE STATUS

a. General Ordinarily, in cases involving reviews under the provisions of paragraphs 4.08 and 4.09, employees will be retained in a pay and active duty status in their current assignment.

However, in those instances where it is determined that the employee's continued presence at the work site might pose a threat to employees or others, result in loss of or damage to Government property or otherwise jeopardize legitimate Government interests, the following alternatives may be considered:

(1) Detailing the employee to another assignment where the employee is no longer a threat to safety, to the VA mission, or to Government property;

(2) Allowing the employee to take leave (annual leave, sick leave or leave without pay), or carrying the employee as absent without leave if the employee has absented himself or herself from the work site without requesting leave;

(3) As a last resort, placing the employee in a paid non-duty status for a brief period pending a decision on whether a summary review is appropriate.

b. Clinical Privileges. Any initiation of action under paragraph 4.09 should be carefully reviewed to determine whether a review of the employee's clinical privileges is also appropriate.

Authority: 38 U.S.C. 7403(b); 7304

4.12 ABEYANCE AND FIRM CHOICE AGREEMENTS

A probationary separation me bc held in abeyance if, at the request of the employee, the official authorized to approve the probationary separation approves an opportunity for the employee to participate in counseling or treatment. In affording the opportunity for rehabilitation of a handicapped condition, applicable provisions of VA personnel and local policies will be followed. In such cases a firm choice or abeyance agreement may be entered into which provides that the employee shall seek counseling or treatment for a condition covered under the Rehabilitation Act of 1973. An employee must complete counseling or treatment in sufficient time to provide an opportunity to review the employee's performance prior to the end of the probationary period.

4.13 ACTION UPON COMPLETION OF PROBATIONARY PERIOD

a. Satisfactory Completion of Probationary Period Each employee who satisfactorily completes the probationary period will automatically attain status as a permanent employee.

b. Acknowledgment. An acknowledgment should be made to those who acquire permanent status (e.g., a congratulatory letter to the employee from the facility Director or an item in the facility news bulletin).

c. Formal Personnel Action. Human Resources Management offices will not initiate a formal personnel action to document the completion of the probationary period.

Authority: 38 U.S.C. 7403(b); 7304

PROBATIONARY REVIEW AUTHORIZING OFFICIALS AND BOARDS

(To be used with pars. 4.04, 4.08 and 4.09)

ASSIGNMENT	AUTHORIZING OFFICIAL	REVIEW BOARD
VA Central Office	Appropriate Service Director and Equivalent Position or Above	Appropriate Central Office PSB (Professional Standards Board)
Facility Director	Appropriate VISN Director	Appropriate Central Office PSB
Chief of Staff	Facility Director	Appropriate Central Office Board
Facility employees (except the following)	Appropriate Service Chief	Local PSB*
Assistant/ Associate Chiefs, Nursing Service	Chief, Nursing Service	VISN Nurse PSB

**For dentists and expanded-function dental auxiliaries, reviews will he conducted by the PSBs listed in chapter 5, Appendix 5A, this Supplement.*

**If a facility Director believes a local PSB meeting the requirements of this Chapter cannot be constituted, the appropriate VISN board will be asked to complete the probationary review. If there are no VISN boards for the occupation, another facility Director may be asked to establish a PSB for this purpose*

**For podiatrists and optometrists, the appropriate service chief is the authorizing official; however, the review will be conducted by the VA Central Office Professional Standards Board.*

Authority: 38 U.S.C. 7403(b); 7304.

VHA Supplement MP-5, Part II October 30,1998
Chapter 4
APPENDIX 4B

INSTRUCTIONS FOR USE OF VA FORM 10-2534, BOARD ACTION, TO DOCUMENT SUMMARY PROBATIONARY REVIEWS (To be used with paragraph 4.09)

The Board Action will be completed in triplicate as follows:

1. FINDINGS. Item 5 must contain the Board's findings. This is to include a brief, but concise summary of information obtained through interviews and records that the Board determines to be directly relevant to the service or conduct of the employee. If a verbatim recording of the Board's interview of the employee is made, a copy of the transcript of the recording, and other pertinent documents or exhibits, will be appended to the Board Action. The employee, on request, will be furnished a copy of the transcript of the verbatim recording and any summary report of the Board proceedings.

2. RECOMMENDATION. Item 6 will contain the recommendation of the Board.

3. OTHER RECOMMENDATIONS AND ADDITIONAL REMARKS. Item 9 will contain any other recommendations and additional remarks to support the recommendation in item 6.

4. ACTION BY APPROVING AUTHORITY. The designated official will indicate final approval or disapproval of a Board finding or recommendation for retention by completing items 14, 15, and 16 (except at VHA facilities in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and Dakota, where the Board will approve its recommendations) If the recommendation is modified, the Board's recommendation will be disapproved, with the annotation that a memorandum regarding the modification is attached. A memorandum relating to the modification will then be attached to the Board Action.

Authority: 38 U.S.C. 7403(b); 7403

INSTRUCTIONS FOR FORWARDING PROBATIONARY REVIEW MATERIAL TO VA CENTRAL OFFICE

1. WHERE TO SUBMIT. All field facility recommendations for separation during probation requiting VA (Department of Veterans Affairs) Central Office summary review or approval (e.g.,actions related to facility Directors and requests for summary reviews for podiatrists and optometrists) are to be sent through the appropriate VISN (10N_051). For VA Central Office employees, such recommendations are to be forwarded by the authorizing official to the Office of Human Resources Management (052).

2. CONTENTS OF FORWARDED FILE. The material forwarded will include the Official Personnel Folder, Director's recommendation (where appropriate) and any other applicable comments; VA Form 10-2543, Board Action, (in duplicate); one copy of all related documents, including one copy of all Proficiency Reports prepared during the probationary period; and the employee's Official Personnel Folder.

Authority: 38 U.S.C. 7403(b); 7304.

VHA Supplement MP-5, Part II October 30, 1998
Chapter 4
APPENDIX 4D

SAMPLE NOTICE OF SUMMARY REVIEW

FOR OFFICIAL USE ONLY

(Employee Name)
(Service)
VA Medical Center
(City), (State) (Zip)

SUBJECT: Summary Probationary Review and Convening of (type of Board) PSB (Professional Standards Board)

1. This is to notify you that a PSB will be held on (Date) at (Time) in (Place) to conduct a summary review of your employee during your probationary period and make recommendations concerning your retention in or separation from the Veterans Health Administration. The review is being held pursuant to 38 U.S.C. (United States Code) section 7403(b), and will be based upon available records and information furnished by you and others who may be called by the PSB.

2. The PSB is to review the following alleged deficiencies in your performance (and/or conduct, if appropriate): (Insert reasons for the review. The statement of reasons should be brief, but in sufficient detail for the employee to clearly understand why he or she may not be considered fully qualified and satisfactory.)

3. You are entitled to:

a. Review documents relied upon in initiating or recommending this summary Board review, subject to applicable disclosure restrictions;

b. An impartial review by the PSB;

c. Respond orally and/or in writing to the PSB concerning the reasons for the review; and

d. Be represented by an individual of your choice, provided the choice would not create a conflict of interest. This is not an adversarial proceeding, so your representative's role will be limited to assisting you in exercising your right to respond orally and/or in writing to the reasons for the review. However, any response to a request for information from the PSB during its review is considered a part of your reply. Accordingly, your representative may assist you in these matters.

4. Please notify me by (insert date normally no less than 3 workdays before the Board review date) whether you will attend the PSB meeting in person, submit a written statement, or both. Please include in your notice the name, address, and occupation of your representative, should

you choose to have one. If you wish to submit a written statement to the Board, it is also to be submitted to me by the above date.

5. After review, the PSB will forward its recommendations to the Director, or designee, for final decision. If the PSB finds you not to be fully qualified and satisfactory, your separation will be recommended. You will be advised of the results of this review in writing.

6. Additional information about these procedures may be obtained by contracting (insert name of the appropriate human resources manager), at extension _____.

_____
(Signature)

Name (of Chairperson)
Chairperson,
Professional Standards Board

NOTE: *As indicated in paragraph 4.09 j, above, approving officials are responsible for ensuring adherence to the required procedures and time standards for VA initiated reporting of separated licensed healthcare employees to license monitoring entities as prescribed in VHA Manual M-2, Part I, Chapter 34.*

SAMPLE LETTER OF ADMONISHMENT

(Use Appropriate Letterhead)

In Reply To: (Ref. Sym.)

FOR OFFICIAL USE ONLY

(Employee Name)
(Service)
VA Medical Center
(City), (State) (Zip)

SUBJECT: Admonishment

1. You are hereby admonished for (example: being absent without leave for 8 hours on date without the required authorization by your supervisor.)

2. A copy of this admonishment and any written reply that you wish to make will be filed in your Official Personnel Folder. This admonishment may remain in your folder from 6 months to 2 years, depending on your future conduct. It will be destroyed when it is withdrawn. (For admonishments of patient abuse,

substitute "...may remain in your folder as long as you are with the Department of Veterans Affairs, or it may be withdrawn and destroyed at any time after 2 years, depending on your future conduct.")

NOTE: *Use the following paragraph for all penalty actions related to professional conduct or competence, and penalty actions for reasons other than professional conduct or competence if the employee is not covered by a negotiated grievance procedure.*

3. If you believe that this admonishment is unjustified, you may appeal the action under the VA grievance procedure. Your formal grievance must be submitted through your supervisor within 15 calendar days after you receive this admonishment. For further information about the VA grievance procedure, you may consult the Chief, Human Resources Management.

_____

(Signature and Title of appropriate official)

FOR OFFICIAL USE ONLY

SAMPLE LETTER OF REPRIMAND

(Use Appropriate Letterhead)

In Reply To: (Ref. Sym.)

FOR OFFICIAL USE ONLY

(Employee Name)
(Service)
VA Medical Center
(City), (State) (Zip)

SUBJECT: Reprimand

1. You are hereby reprimanded for (example: being absent without leave for 8 hours on date and 8 hours on date. Your absence on both of these occasions was not authorized by your supervisor as requires.)

2. A copy of this reprimand and any written reply that you may wish to make will be filed in your Official Personnel Folder. This reprimand may remain in your folder for 2 to 3 years, depending on your future

conduct. It will be destroyed when it is withdrawn. (For reprimands for patient abuse, substitute "...may remain in your folder as long as you are with the Veterans health Administration, or it may be withdrawn and destroyed at any time after 3 years, depending on your future conduct.")

NOTE: *Use the following paragraph for <u>all</u> penalty related to professional conduct or competence, and penalty actions for reasons other than professional conduct or competence if the employee is not covered by negotiated grievance procedure.*

3. If you believe that this reprimand is unjustified, you may appeal the action under the VA grievance procedure. Your formal grievance must be submitted through your supervisor within 15 calendar days after you receive this reprimand. For further information about the VA grievance procedure, you may consult the Chief, Human Resources Management.

_____

(Signature and title of appropriate official)

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Supreme Court, U.S.
FILED
NOV 3 - 2008
OFFICE OF THE CLERK

No. 08-281

In the Supreme Court of the United States

WILLIAM N. WEBER, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court had authority to adjudicate petitioner's claim under the Back Pay Act of 1966, 5 U.S.C. 5596.

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In the Supreme Court of the United States

No. 08-281

WILLIAM N. WEBER, PETITIONER

v.

DEPARTMENT OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-24a) is reported at 521 F.3d 1061. The initial opinion of the court of appeals (Pet. App. 25a-45a) is reported at 512 F.3d 1178. The order of the district court (Pet. App. 46a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2008. A petition for rehearing was denied on April 4, 2008 (Pet. App. 1a, 8a). The petition for a writ of certiorari was filed on July 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has prescribed standards for the appointment, pay, discipline, and removal of Veterans

Health Administration (VHA) employees. See 38 U.S.C. 7401 *et seq.* The availability and form of review that such an employee may obtain of adverse personnel actions varies depending on whether the employee is a permanent full-time employee, as well as the nature and basis for the adverse action.

a. VHA physicians who are "employed on a full-time basis under a permanent appointment" and who have been subjected to an "adverse personnel action" are entitled to pursue an administrative appeal under either 38 U.S.C. 7462 or 38 U.S.C. 7463. See Department of Veterans Affairs Labor Relations Improvement Act of 1991, 38 U.S.C. 7461(a) and (c)(1).

i. In situations where "a major adverse action was taken" and "the case involves or includes a question of professional conduct or competence," Congress has provided that the administrative appeal authorized by Section 7461(a) shall be heard by a Disciplinary Appeals Board (Appeals Board), 38 U.S.C. 7461(b)(1), whose members are appointed by the Secretary of Veterans Affairs (Secretary), 38 U.S.C. 7464(a); see 38 U.S.C. 7461(c)(3)(A) and (B) (defining a question of professional conduct or competence as one involving "[d]irect patient care" or "[c]linical competence"). Such appeals are addressed in 38 U.S.C. 7462. Congress has further provided that the decisions of an Appeals Board are subject to review by the Secretary, see 38 U.S.C. 7462(d), and then to judicial review under a standard similar to that set forth in the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See 38 U.S.C. 7462(f).

ii. Administrative appeals by permanent, full-time employees that either do not involve a major adverse action or do not involve a question of professional conduct or competence are governed by 38 U.S.C. 7463. See

38 U.S.C. 7461(b)(2). Congress has provided that "Disciplinary Appeals Boards shall not have jurisdiction to review such matters." 38 U.S.C. 7463(a). Instead, in such cases, the matter is first considered by "an impartial examiner," 38 U.S.C. 7463(d)(1), whose "findings and recommendations" are subject to "a prompt review * * * by an official of a higher level than the official who decided upon the action," 38 U.S.C. 7463(d)(3). Section 7463 does not provide that the decisions of that higher-level official are subject to review by the Secretary or to judicial review.

b. The procedures described above are applicable only to employees who are "employed on a full-time basis under a permanent appointment." 38 U.S.C. 7462(c). Accordingly, probationary VHA employees who seek to challenge an adverse personnel action possess only those remedies set forth in the agency rules and regulations relating to their probationary employment.

2. In October 1997, petitioner was hired on a temporary basis to be a staff radiologist at the Veterans Administration Medical and Regional Center in Fort Harrison, Montana. Pet. App. 8a. On December 7, 1997, petitioner's position was converted into a full-time staff position. *Ibid.* As required by 38 U.S.C. 7403(b)(1) and (2), petitioner's initial full-time appointment was "for a probationary period of two years" and was made subject to "review[] from time to time by a board" (summary review board) whose members are "appointed in accordance with regulations of the Secretary." See Pet. App. 8a-9a. Section 7403(b)(2) further provides that if a summary review board "finds that [a probationary employee] is not fully qualified and satisfactory, such person shall be separated from the service."

On August 2, 1999, a summary review board was convened to review petitioner's appointment. Pet. App. 10a. Petitioner was notified 40 days in advance of the summary review board's meeting and was represented by counsel when the summary review board convened. *Id.* at 52a. On August 12, 1999, the summary review board issued a recommendation that petitioner be separated from the VHA. *Id.* at 10a. The summary review board concluded that "no single incident recounted to the Board or demonstrated by the evidence appears to warrant removal." *Id.* at 53a (citation omitted). But it found that, "taken as a whole[,] [petitioner's] pattern of behavior, attitude toward correction, and erosion of staff confidence lead the Board to conclude that his retention beyond the probationary period would prohibit the effective functioning of the Radiology Department." *Ibid.* (citation omitted). On September 13, 1999, the VHA terminated petitioner's employment. *Ibid.*

3. On March 8, 2000, petitioner filed suit against the Department of Veterans Affairs (VA) and two of its officials in federal district court, asserting that his termination had violated the APA. Pet. App. 51a, 53a, 55a.[1] On June 2, 2004, the district court granted summary judgment in favor of petitioner. *Id.* at 51a-59a. In its order, the district court concluded that the summary review board had "violated [VHA] regulations by considering charges against [petitioner] that had not been included in the notice of Summary Review." *Id.* at 55a. The court also determined that "[t]he significance and effect of the

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[1] On July 9, 2002, petitioner filed a second action in which he alleged that his termination violated various civil rights statutes. See Pet. App. 53a n.1. We have been advised that petitioner's appeal from the district court's November 2005 dismissal of that action is currently on appeal to the Ninth Circuit. Accord *id.* at 47a & n.1

consideration of the undisclosed matters by the Summary Review Board [could not] be determined from the record," and it "REMANDED to the VA for further proceedings in accordance with applicable law and regulations." *Id.* at 58a-59a. On June 3, 2004, the VHA reinstated petitioner's employment and immediately placed him on administrative leave with pay. *Id.* at 11a.[2]

4. a. On September 15, 2004, petitioner filed a new action against the VA and the Secretary seeking back pay for the period between his September 13, 1999, termination and his June 3, 2004, reinstatement. Pet. App. 11a-12a. Petitioner asserted that the district court had authority to grant such relief pursuant to the Back Pay Act of 1966 (Back Pay Act), 5 U.S.C. 5596. Pet App. 46a. The Back Pay Act provides that a qualifying "employee * * * who, on the basis of a timely appeal or an administrative determination * * * is found by an appropriate authority * * * to have" suffered "the withdrawal or reduction of all or part of [his] pay, allowances, or differentials" as a result of "an unjustified or unwarranted personnel action" may recover his lost pay as well as attorney's fees. 5 U.S.C. 5596(b)(1).

b. The district court granted respondents' motion to dismiss petitioner's complaint. Pet. App. 46a-50a. The court rejected petitioner's assertion that its June 2, 2004, decision had resolved "as a matter of law, all of" the requirements for obtaining relief under the Back Pay Act. *Id.* at 48a. The court explained that its earlier decision had been "limited to a narrow issue of regulatory procedure" and had not "consider[ed] or resolve[d],

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[2] After petitioner was reinstated, the VHA convened a new summary review board, which also recommended termination of petitioner's employment. Petitioner was ultimately discharged from his service with the VHA, effective December 6, 2005. Pet. App. 11a.

expressly or by implication, issues of 'withdrawal or reduction' of [petitioner's] pay or other benefits." *Id.* at 48a-49a (quoting 5 U.S.C. 5596(b)(1)).

The district court also expressed doubts about petitioner's ability to satisfy two additional requirements for relief under the Back Pay Act. First, the court observed that the Back Pay Act "does not, by itself, clothe this Court with jurisdiction over the back pay claim," and it described "the premise that this Court is an 'appropriate authority' to make a decision on [Back Pay Act] issues to be extremely doubtful." Pet. App. 49a (quoting 5 U.S.C. 5596(b)(1)). Second, the district court described the record in the previous case as having been "overwhelming with evidence of justification for [petitioner's] separation as a probationary employee." *Ibid.*; see 5 U.S.C. 5596(b)(1) (requiring a determination that employee had been subjected to "an unjustified or unwarranted personnel action").

5. The court of appeals remanded the case to the district court with instructions to dismiss petitioner's complaint based on lack of jurisdiction. Pet. App. 1a-24a. Relying on this Court's decision in *United States* v. *Fausto*, 484 U.S. 439 (1988), the court of appeals first determined that "the APA does not provide a basis for petitioner to assert his [Back Pay Act] claim" in federal court. Pet. App. 20a. The court of appeals also rejected petitioner's alternative claim that the Back Pay Act itself "provides the necessary waiver of sovereign immunity for the district court to hear his back pay claim." *Ibid.* The court stated that "[t]he requirements to invoke jurisdiction under the [Back Pay Act] are: (1) a finding of 'an unjustified or unwarranted personnel action;' (2) by an appropriate authority.'" *Ibid.* (quoting 5 U.S.C. 5596(b)(1)). The court of appeals concluded

that petitioner could not satisfy those requirements "because the district court * * * was not an 'appropriate authority'" under that provision. *Id.* at 21a. The court explained that Congress has not authorized "probationary physicians such as [petitioner to] seek[] judicial review of summary review board determinations under the" Back Pay Act. *Id.* at 22a. It further observed that, under VA regulations, the summary review board report from which petitioner originally sought judicial review could have been the subject of further proceedings within the VHA. *Ibid.* The court of appeals "express[ed] no opinion on whether the district court properly asserted subject matter jurisdiction" over petitioner's earlier action under the APA. *Id.* at 22a n.2.

ARGUMENT

Petitioner contends (Pet. ii, 5-12) that the court of appeals erred in concluding that the district court did not have jurisdiction to consider his claim under the Back Pay Act. The court of appeals' decision is correct and does not conflict with the decisions of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the district court was not "an appropriate authority" for purposes of the Back Pay Act at the time it issued its June 2004 decision.

In *United States* v. *Fausto*, 484 U.S. 439, 447, 455 (1988), this Court held that an "excepted service" federal employee for whom the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (5 U.S.C. 7501 *et seq.*), did not provide a right of review before any court could not obtain judicial review of an adverse personnel action under the Back Pay Act. The Court con-

cluded that the exclusion of certain federal employees from the remedies set forth in the CSRA "display[ed] a clear congressional intent to deny the excluded employees the protections of Chapter 75—including judicial review—for personnel action covered by that chapter." *Fausto*, 484 U.S. at 447. The Court also explained that "under the comprehensive and integrated review scheme of the CSRA," the only "appropriate authorit[ies]" for purposes of the Back Pay Act would be "the agency itself," the Merit Systems Protection Board, or a court with "authority to review the agency's [underlying] determination." *Id.* at 454; see also *Pathak* v. *Department of Veterans Affairs*, 274 F.3d 28, 31 (1st Cir. 2001) (stating that "*Fausto* stands for the general proposition that judicial review is unavailable to a federal employee who has suffered an adverse personnel action if [the CSRA] does not provide judicial review").

Like the respondent in *Fausto*, petitioner falls squarely with the category of federal employees that Congress has specifically excluded from the remedies set forth in the CSRA. Congress has provided that the subchapter of the CSRA that governs separation from service "does not apply to" certain categories of employees. 5 U.S.C. 7511(b). Among the enumerated categories are "an employee * * * who holds a position within the [VHA] which has been excluded from the competitive service by or under a provision of title 38, unless such employee was appointed to such position under section 7401(3) of such title." 5 U.S.C. 7504(b)(10); accord 5 U.S.C. 7511(a)(1)(C)(i) (defining "employee" for purposes of the same subchapter to include "an individual in the excepted services * * * who *is not* serving a probationary or trial period under an initial appointment pending conversion to the competi-

tive service") (emphasis added). Because Congress has provided that appointments of "health-care professionals" at the VHA shall be made "without regard to civil-service requirements," 38 U.S.C. 7403(a)(1), such positions are not part of the "competitive service," see 5 U.S.C. 2102(a)(1). In addition, appointment of "[p]hysicians" by the VHA is addressed in 38 U.S.C. 7401(1) (Supp. V 2005) rather than 38 U.S.C. 7401(3) (Supp. V 2005). Accordingly, it is clear that probationary VHA physicians like petitioner are not entitled to seek relief from adverse personnel actions under the CSRA. See *Pathak*, 274 F.3d at 31.[3]

The provisions of Title 38 governing VHA employment further underscore that the district court did not have "authority to review" (*Fausto*, 484 U.S. at 454) the merits of the VHA's decision to terminate petitioner's employment during the two-year probationary period. Congress has expressly provided that "if [a summary review] board finds that [a probationary employee] is

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[3] The fact that petitioner is not entitled to seek relief for adverse personnel actions does not mean that the CSRA "does not apply to" him (Pet. 10) or that he "is not covered at all by [it]" (Pet. 12). To the contrary, the CSRA's general definition of "employee" clearly includes physicians hired on a probationary basis by the VHA. See 5 U.S.C. 2105(f) (stating that "employees appointed under chapter 73 or 74 of title 38 shall be employees" for certain purposes); 38 U.S.C. 7403(b) (providing for appointment of probationary employees such as petitioner). It is true that "[s]ince *Fausto* was decided, the CSRA has been amended to provide review for nonpreference eligible members of the excepted service." *Bosco* v. *United States*, 931 F.2d 879, 883 n.3 (Fed. Cir. 1991) (citing Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461); see Pet. 10-11 (citing *Bosco*). But that point is irrelevant here because there is no question that probationary employees such as petitioner are still not eligible to pursue relief under the CSRA. See pp. 8-9, *supra*.

not fully qualified and satisfactory, such person *shall* be separated from the service." 38 U.S.C. 7403(b)(2) (emphasis added). In addition, Congress has *expressly* provided a non-CSRA mechanism by which certain non-probationary VHA employees may seek judicial review of certain kinds of major adverse employment actions, see 38 U.S.C. 7462; p. 2, *supra*, but it has not made that mechanism available to probationary VHA employees. Under this Court's holding in *Fausto*, petitioner was not entitled to circumvent those restrictions on the availability of judicial review in Title 38 by seeking to recast his claim as one under the APA or the Back Pay Act. Accord *Pathak*, 274 F.3d at 32 (stating that "Congress's express provision of judicial review in [38 U.S.C. 7462], coupled with a complete omission of judicial review in * * * the provision governing Pathak * * * is persuasive evidence that Congress deliberately intended to foreclose further review of such claims") (internal quotation marks and citation omitted).

Petitioner asserts that he is "entitled to back pay" because the VA "fail[ed] to follow its own rules" in terminating his employment on September 19, 1999. Pet. 8; see Pet. 6-9. But, as this Court explained in *Fausto*, see 484 U.S. at 454, that argument begs the question of whether the district court was an "appropriate authority" to determine whether petitioner suffered a loss of pay or other covered benefits as a result of "an unjustified or unwarranted personnel action." 5 U.S.C. 5596(b)(1). And, as explained previously, the answer is no. "This does not mean that the statutory remedy provided in the Back Pay Act is eliminated, or even that the conditions for invoking it are in any way altered." *Fausto*, 484 U.S. at 454. It simply means that petitioner has not obtained an appropriate determination from an

appropriate tribunal. Cf. Pet. App. 49a (district court describing the record in the previous case as having been "overwhelming with evidence of justification for [petitioner's] separation as a probationary employee").

2. Petitioner errs in contending that the court of appeals' decision in this case creates "a direct conflict" (Pet. 5) with *Ward* v. *Brown*, 22 F.3d 516 (2d Cir. 1994) (see Pet. 5-6), *Romero* v. *United States*, 38 F.3d 1204 (Fed. Cir. 1994) (see Pet. 5, 7, 11), or *Bosco* v. *United States*, 931 F.2d 879 (Fed. Cir. 1991) (see Pet. 10-11).

In *Ward*, the Second Circuit stated that "the Back Pay Act * * * provides an explicit waiver of sovereign immunity *in cases covered by that Act*." 22 F.3d at 520 (emphasis added). Here, the court of appeals simply held that petitioner's case was *not* covered by the Back Pay Act because no "appropriate authority" had determined that he had been subject to "an unjustified or unwarranted personnel action." 5 U.S.C. 5596(b)(1); see Pet. App. 21a-22a.

In *Romero*, the Federal Circuit interpreted this Court's holding in *Fausto* as being inapplicable to "a type of personnel action—withholding of pay for income tax purposes—that 'is not covered at all by the CSRA, for any employees.'" *Romero*, 38 F.3d at 1211 (quoting *Bosco*, 931 F.2d at 883); accord *Bosco*, 931 F.2d at 883 (viewing *Fausto* as holding that the CSRA is "the only means of review as to the *types* of adverse personnel action specifically *covered* by the CSRA" (first emphasis added)). But the "type of personnel action" at issue in this case—separation from service—is *expressly* addressed by the CSRA. See 5 U.S.C. 7512(1). Accordingly, there is no conflict between the court of appeals' decision in this case and the Federal Circuit's decisions in *Romero* and *Bosco*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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